RETURN

(40*d*.)

To an ADDRESS of the HOUSE of COMMONS, dated the 21st March, 1894, for copies of all petitions, memorials and correspondence, in reference to the appeal made in the name of the Roman catholic minority of the province of Manitoba, in reference to the School Laws of that province; also copies of reports to and orders in council in reference to the same; also copies of the case submitted to the Supreme Court of Canada respecting aforesaid appeal, and including factums and all materials in connection therewith, and copies of all judgments rendered and answers given by said court on or to the question referred to them.

JOHN COSTIGAN,
Secretary of State.

GOVERNMENT HOUSE, WINNIPEG, 25th February, 1893.

The Hon. the SECRETARY OF STATE,
Ottawa.

SIR,—Referring to the following telegram:

"LIEUT.-GOVERNOR OF MANITOBA, WINNIPEG.

"OTTAWA, 22nd February, 1893.

"The following order in council has been passed to-day:—

"'The committee of the privy council having considered the arguments advanced by Mr. Ewart on behalf of the petitioners in Manitoba, who have requested redress from your excellency with respect to certain statutes of the province relating to education, are of opinion that the important questions of law which were suggested in the report of the sub-committee to whom said petitions were referred, should be authoritatively settled before the appeal which has been asserted by said petitions be further proceeded with. The committee therefore advise that a case be prepared on this subject, in accordance with the provisions of the Act 54-55 Vict., chapter 25, and they recommend that if this report be approved, a copy thereof be transmitted by telegraph to his honour the lieutenant-governor of Manitoba, and to John S. Ewart, counsel for the petitioners, in order that if they be so disposed, the government of Manitoba and the said counsel may offer suggestions as to the preparation of such case and as to the questions which should be embraced therein.

"'W. B. IVES,
"'*President of the Privy Council.*"

Received by me from the honourable the president of the privy council, and transmitted by me upon the same day for the information and action of my government, I have been advised by my government with reference thereto, as follows:—

"WINNIPEG, February 24th, 1893.

"WALTER ROBERT BROWN, Esq.,
"Private Secretary to His Honour the
"Lieutenant-Governor.

"SIR,—In further answer to the communication received from you, dated 22nd instant, transmitting a copy of a telegram from the Honourable W. B. Ives, president of the privy council of Canada, relating to the order in council providing for a case with reference to certain statutes of this province relating to education, under the provisions of the Act 54-55 Vict., chapter 25, I am instructed to say that his honour's government does not deem it incumbent upon them to take any action in reference to the framing of such a case.

"His honour's government desires, however, to be put in possession of a copy of such case when settled, and of the date fixed for the argument thereof, in order to be in a position to consider in due time the advisability of being represented thereon.

"I have, etc,,
"J. D. CAMERON,
"*Provincial Secretary.*"

I have the honour to be, sir,
Your obedient servant,

JOHN SCHULTZ,
Lieutenant-Governor.

CERTIFIED COPY *of a report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council on the 22nd April,* 1893.

On a report dated 20th April, 1893, from the acting minister of justice, submitting in conformity with the order of your excellency in council, dated 22nd February, 1893, and under the provisions of the Act 54-55 Vict., cap. 25, a draft which he has had prepared of a case for reference to the supreme court of Canada for hearing and consideration touching certain statutes of the province of Manitoba relating to education, and the memorials of certain petitioners in Manitoba complaining thereof.

The committee on the recommendation of the acting minister of justice advised that certified copies of the draft be transmitted, respectively, to the lieutenant-governor of Manitoba and to Mr. John T. Ewart, counsel for the petitioners, in order that if they be so disposed, the government of Manitoba and the said counsel for the petitioners may offer any suggestions or observations which they desire to make with respect to such case, and the questions which should be embraced therein, all which is respectfully submitted for your excellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

OTTAWA, 20th April, 1893.

Case submitted to the supreme court of Canada by his excellency the governor general in council, pursuant to the authority of the revised statutes, chapter 135, intituled "An Act respecting the Supreme and Exchequer Courts," as amended by section 4, of chapter 25, of the acts of the parliament of Canada, passed in 54th and 55th year of her majesty's reign, intituled "An Act to amend chapter 135 of the revised statutes of Canada," intituled "An Act respecting the Supreme and Exchequer Courts."

Annexed hereto is an order of his excellency the governor general in council, made on the 29th of December, 1892, approving of a report of a sub-committee of council thereto annexed, upon certain memorials complaining of two statutes of the legislature of Manitoba, relating to education, passed in the session of 1890. The

memorials therein referred to and all correspondence in connection therewith are hereby made part of this case, together with all statutes, whether provincial, dominion or imperial, in any wise dealing with, or affecting the subject of education in Manitoba, and all proceedings had or taken before the court of queen's bench, Manitoba, the supreme court of Canada and the judicial committee of the privy council in the causes of Barrett *vs.* the City of Winnipeg, and Logan *vs.* the City of Winnipeg; and all decisions or judgments in such cases are to be considered as part of this case and are to be referred to accordingly.

The questions for hearing and consideration by the supreme court of Canada being the same as those indicated in the report of the subcommittee of council above referred to, are as follows:—

1. Is the appeal referred to in the said memorials and petitions and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of "The British North America Act, 1867," or by subsection 22 of "The Manitoba Act, 33 Victoria (1870) chapter 3 (Canada)?

2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to?

3. Does the decision of the judicial committee of the privy council in the cases of Barrett *vs.* the City of Winnipeg, and Logan *vs.* the City of Winnipeg dispose of or conclude the application for redress based on the contention that the rights of the Roman catholic minority which accrued to them after the union under the statutes of the province have been interfered with by the two statutes of 1890 complained of in the said petitions and memorials?

4. Does subsection 3 of section 93 of "The British North America Act, 1867," apply to Manitoba?

5. Has his excellency the governor general in council power to make the remedial orders which are asked for in said memorials and petitions, assuming the material facts to be as stated therein?

6. Did the acts of Manitoba relating to education, passed prior to the session of 1890, confer on the minority a "right or privilege with respect to education" within the meaning of subsection 2 of section 32 of "The Manitoba Act," or establish a "system of separate or dissentient schools" within the meaning of subsection 3 of section 93 of "The British North America Act, 1867," if said section ninety-three be found to be applicable to Manitoba, and if so, did the two Acts of 1890 complained of affect the right or privilege of the minority in such a manner as to warrant an appeal thereunder to the governor general in council?

WINNIPEG, MAN., 4th May, 1893.

JOHN J. MCGEE, Esq.,
Clerk of the Privy Council, Ottawa, Ont.

DEAR SIR,—I have to acknowledge the receipt of your letter of the 22nd April, together with the documents to which it refers. In reply, I beg to repeat my previous suggestion to the effect that there should be referred to the supreme court all questions upon which, in the opinion of his excellency in council, there may be such doubt as to interfere with the granting of the prayers of the petitions filed on behalf of my clients. I can, of course, be of no assistance in ascertaining what such questions are. I may, however, be allowed to suggest with reference to the questions formulated in the draft case sent to me, the following for the consideration of his excellency in council:—

1. In the caption, the title of the statutes 54 and 55 Vict., 25, should be correctly stated.

2. The word "as" should be substituted for the word "of" in the sentence commencing "The questions for hearing."

3. In paragraph 1, instead of "subsection 22," read "subsection 2 of section 22."

4. Add to the end of paragraph 2 the words "or either of them."

5. For paragraph 5, substitute the following:—

"(5.) Has his excellency the governor general in council power to make the declarations or remedial orders which are asked for in said memorials and petitions,

assuming the material facts to be as stated in the memorials and petitions, or has his excellency the governor general in council any other jurisdiction in the premises?"

In support of this suggestion, I beg to refer to the 4th and 5th paragraphs of the prayer of the petition which I had the honour to forward to you on the 31st day of October, 1892. It will be observed that while we there indicated the general nature of the relief to which we deem ourselves entitled, yet we ask "that such further or other declaration or order may be made as to your excellency the governor general in council shall, under the circumstances, seem proper; and that such directions may be given, provision made, and all things done in the premises for the purpose of affording relief to the said Roman catholic minority in the said province, as to your excellency in council may seem meet."

6. For paragraph 6 substitute the following:—

(6.) Did the acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education," within the meaning of subsection 2 of section 22 of the Manitoba Act; or establish a "system of separate or dissentient schools," within the meaning of subsection 3 of section 93 of "The British North America Act, 1867," (if said section 93 be found to be applicable to Manitoba), and if yea, in either case, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority?

The principal amendment here suggested is the omission of the words which follow the above, viz.: "in such a manner as to warrant an appeal thereunder to the governor general in council." I beg to suggest that the question for the courts is whether any right or privilege has been affected; not whether it has been so affected as to warrant an appeal, which probably means an appeal which ought to be granted, for if an appeal is warranted it ought to be granted.

The question as I put it involves a mere question of law. As now framed it involves the further question whether some right or privilege having been interfered with, his excellency in council ought to entertain the appeal—ought to hold that the appeal was warranted.

I have the honour to be, sir,
Your obedient servant,
JOHN S. EWART.

CERTIFIED COPY *of a report of a Committee of the Honourable the Privy Council, approved by his Excellency the Governor General in Council on the 8th July*, 1893.

On a report dated 7th July, 1893, from the acting minister of justice, submitting that, in conformity with an order of your excellency in council, dated 22nd April, 1893, a draft case prepared for reference to the supreme court of Canada, touching certain statutes of the province of Manitoba relating to education, and the memorials of certain petitioners in Manitoba complaining thereof, was communicated to the lieutenant governor of Manitoba, and to Mr. John S. Ewart, Q.C., counsel for the petitioners, for such suggestions and observations as they might respectively desire to make in relation to such case and the questions which should be embraced therein.

No reply has been received from the lieutenant governor of Manitoba. Mr. Ewart, under date 4th May, 1893, has made certain observations and suggestions which he, the minister, has had under consideration. The minister upon such consideration has made some amendments to the draft case which he submits for your excellency's approval.

The minister recommends that the case, as amended, copy of which is herewith submitted, be approved by your excellency, and that copies thereof be transmitted to the lieutenant governor of Manitoba and to Mr. Ewart, with the information that the same is the case which it is proposed to be referred to the supreme court of Canada, touching the statutes and memorials above referred to.

The committee submit the same for your excellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

OTTAWA, 7th July, 1893.

Case submitted to the supreme court of Canada, by his excellency the governor general in council, pursuant to the authority of the Revised Statutes of Canada, chapter 135, intituled "An Act respecting the Supreme and Exchequer Courts," as amended by section 4, of chapter 25, of the acts of the parliament of Canada, passed in 54th and 55th year of her majesty's reign, intituled "An Act to amend chapter 135 of the Revised Statutes, intituled 'An Act respecting the Supreme and Exchequer Courts.'"

Annexed hereto is an order of his excellency the governor general in council, made on the 29th of December, 1892, approving of a report of a sub-committee of council thereto annexed upon certain memorials complaining of two statutes of the legislature of Manitoba, relating to education, passed in the session of 1890. The memorial therein referred to and all correspondence in connection therewith are hereby made part of this case, together with all statutes, whether provincial, dominion or imperial, in anywise dealing with, or affecting the subject of education in Manitoba, and all proceedings had or taken before the court of queen's bench, Manitoba, the supreme court of Canada and the judicial committee of the privy council, in the causes of Barrett *vs.* the City of Winnipeg, and Logan *vs.* the City of Winnipeg; and all decisions or judgments in such cases are to be considered as part of this case and are to be referred to accordingly.

The questions for hearing and consideration, by the supreme court of Canada being the same as those indicated in the report of the sub-committee of council above referred to, are as follows:—

1. Is the appeal referred to in the said memorials and petitions and asserted there by such an appeal as is admissible by subsection 3, of section 93, of "The British North America Act, 1867" or by subsection 2, of section 22, of "Manitoba Act" 33 Victoria, 1870, chapter 3, (Canada)?

2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to or either of them?

3. Does the decision of the judicial committee of the privy council in the cases of Barrett *vs.* the City of Winnipeg, and Logan *vs.* the City of Winnipeg, dispose of or conclude the application for redress based on the contention that the rights of the Roman catholic minority which accrued to them after the union under the statutes of the province have been interferred with by the two statutes of 1890, complained of in the said petitions and memorials?

4. Does subsection 3 of section 93 of "The British North America Act, 1867," apply to Manitoba?

5. Has his excellency the governor general in council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has his excellency the governor general in council any other jurisdiction in the premises?

6. Did the acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of "The Manitoba Act" or establish a "system of separate or dissentient schools," within the meaning of sub-section 3 of section 93 of "The British North America Act, 1867," if said section ninety-three be found to be applicable to Manitoba, and if so did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the governor general in council?

CERTIFIED COPY *of a report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council on the* 31*st July*, 1893.

On a report dated 20th of July, 1893, from the acting minister of justice, submitting with reference to his report of the 7th July instant, which was approved on the 8th July, 1893, submitting a case for reference to the supreme court of

Canada, touching certain statutes of the province of Manitoba, relating to education, and the memorials of certain persons complaining thereof: The minister recommends that the case, copy of which is appended to the above mentioned order in council, be referred to the supreme court of Canada for hearing and consideration, pursuant to the provisions of an act respecting the supreme and exchequer courts, Revised Statutes of Canada, chap. 135, as amended by 54 and 55 Victoria, chapter 25, section 4. The committee submit the same for your exellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

CERTIFIED COPY *of a report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council on the 15th August*, 1893.

The committee on the recommendation of the acting minister of justice advise that pursuant to the provisions of the Act 54-55 Victoria, chapter 25, the attorney general of the province of Manitoba be notified that in accordance with an order of his excellency the governor general in council, dated the 31st day of July, 1893, a case touching certain statutes of the said province relating to education and the memorial of certain petitioners complaining thereof, was referred to the supreme court of Canada for hearing and consideration, and that such case will be heard at the next ensuing sittings of the said court, to wit, on the third day of October next, or so soon thereafter as may be. The committee further advise that a like notice be sent to Mr. John S. Ewart, Q.C., of Winnipeg, council for the petitioners. The committee advise that the attorney general for the province of Manitoba and Mr. Ewart be requested to acknowledge the receipt of such notice respectively.

The committee submit the same for your excellency's approval.

JOHN J. McGEE,
Clerk of Privy Council.

GOVERNMENT HOUSE, WINNIPEG, 20th February, 1894.

The Under Secretary of State, Ottawa.

SIR,—I have the honour to enclose herewith a copy of a letter this morning received from His Grace Archbishop Taché, of St. Boniface, together with a certified copy of the bill intituled "An Act to amend the Public Schools Act," which was read a third time on the 15th instant, to which it refers.

I have, etc.,
JOHN SCHULTZ,
Lieutenant Governor.

ST. BONIFACE, 16th February, 1894.

To His Honour the Lieutenant Governor of Manitoba,
Government House, Winnipeg.

Your honour is aware that the amendments proposed to the school laws have passed their third reading by a unanimous vote of all the protestant members of the legislative assembly, the four catholic members voting unanimously against. This circumstance alone proves that the school question is merely and simply a question of religion, and that catholics are perfectly justified when they say that they are victims to a religious persecution. Should your honour give the royal sanction to such an injustice it would become law, and all the catholic schools of the country would be forced to close their doors or to submit to dispositions contrary to the convic-

tions of true children of the church. Now, our fate is in the hands of your honour and our misfortune cannot be delayed except by the reserving of this new enactment for the good pleasure of his excellency the governor general.

With profound respect,

I remain your obedient servant,

ALEX.,

Arch. of St. Boniface, O.M.I.

I, Elias George Conklin, clerk of the legislative assembly and custodian of the statutes of the province of Manitoba, certify the subjoined to be a true copy of the original enactment passed in the legislative assembly of Manitoba in the second session of the eighth legislature, held in the fifty-seventh year of her majesty's reign.

Given under my hand and the seal of the legislative assembly of the province of Manitoba, at Winnipeg, the twentieth day of February, in the year of our Lord one thousand eight hundred and ninety-four.

E. G. CONKLIN,

Clerk of the Legislative Assembly of Manitoba.

Said act is hereby further amended by inserting therein immediately after section 88 the following section:—

88*a*. In every case in which the organization of a school district fails to be continued by reason of the non-election of trustees or the abandonment of the performance of their duties by trustees who have been duly elected or by reason of the resignation, death or removal of trustees and non-election of their successors, the council of the municipality in which such school district lies shall have full power and authority, and it shall be the duty of the said council to take charge of all the property of such school district, real and personal, and to administer the same for the benefit of the creditors of such school district, if any.

Any funds which arise from the administration of the said property shall after payment of liabilities be kept in a special account to the credit of such school district and disposed as nearly as may be in accordance with the provisions of section 89 of this act.

In case such school district is situated in more than one municipality the inspector in whose jurisdiction such school district is, shall direct the council of one of the municipalities in which such school district lies, to exercise the functions mentioned in the next preceding paragraph, and said council shall thereupon have all the authority and powers therein mentioned and set forth in reference to such school district.

[No. BILL. 1894.]

An Act to amend the Public Schools Act.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the province of Manitoba, enacts as follows:—

1. Section 32 of chapter 127 of the Revised Statutes of Manitoba, is hereby amended by adding thereto the following subsection:

2. The inspector, when he investigates any complaint made under this section, shall have the same power and authority to administer oaths, summon witnesses, enforce their attendance and compel them to produce documents, and to give evidence on oath, as any court has in civic matters.

3. Section 115 of said chapter 127, is hereby amended by adding thereto the following subsections:

2. In computing the number of months for which school has been kept open in each school district during the current year every school which has been kept open in all during the year for one hundred and two teaching days shall be held to have been kept open for six months, and every school which has been kept open in all

during the year for two hundred and four teaching days shall be held to have been kept open for twelve months.

3. When any school has been closed in pursuance of the provisions of "The Public Health Act," the period during which such school has been closed, or in case such period exceeds thirty days, then thirty days of such period shall be computed as teaching days during which such school has been kept open.

4. Section 151 of said chapter 127 is hereby amended by adding thereto the following words "nor in the municipal grant under sections 115 and 116 of this act, nor shall any school assessment be levied or school taxes be collected for the benefit of such school."

5. Section 151 of said chapter 127 is hereby further amended by adding thereto the following subsection:

(2) In any case in which the department of education is of the opinion that a school has been conducted substantially according to the requirements of this section, and that any departure therefrom is of an unimportant character, and has been caused *bona fide* by mistake or inadvertence, the department may cause the usual porportion of the legislative grant to be paid to such school as in ordinary cases. This subsection shall not apply to the case of any school the conduct of which has been in violation of section 194 of this act.

6. Section 161 of said chapter 127 is hereby repealed and the following section substituted therefor:

161. The members of every board of rural school trustees shall hold their first meeting on the first Wednesday in January following the election, at the hour of two o'clock in the afternoon, at the usual place of meeting of such board. In cities, towns and villages the first meeting shall be held at such last place of meeting on the first Wednesday in January, at the hour of eight o'clock in the evening. Organization and any other business of the board may be proceeded with at such meeting.

THE SUPREME COURT OF CANADA, 1875.

OTTAWA, 26th February, 1894.

E. L. NEWCOMBE, Esq., Q.C.,
Deputy Minister of Justice, Ottawa.

SIR,—In the matter of certain statutes of the province of Manitoba relating to education and of the case referred to the supreme court of Canada for hearing and consideration by order in council bearing date the 31st day of July, 1893.

I have the honour to send herewith, for the purpose of being laid before his excellency the governor general in council, the answers to the questions submitted in the above matter and the reasons therefor, duly certified under the seal of the supreme court of Canada.

I have the honour to be, sir, your obedient servant,

ROBERT CASSELS, *Registrar.*

IN THE SUPREME COURT OF CANADA.

TUESDAY, the twentieth day of February, A.D. 1894.

Present:

The Honourable Sir HENRY STRONG, Knight, Chief Justice.
" Mr. Justice FOURNIER,
" Mr. Justice TASCHEREAU,
" Mr. Justice GWYNNE,
" Mr. Justice KING.

In the matter of certain Statutes of the province of Manitoba relating to Education.

The governor in council, by order in council bearing date the thirty-first day of July, one thousand eight hundred and ninety-three, numbered 2103 and passed pursuant to the provisions of "An Act respecting the Supreme and Exchequer

Courts, Revised Statutes of Canada, chapter 135, as amended by 54-55 Victoria, chapter 25, section 4, having referred to the supreme court of Canada for hearing and consideration a case touching certain statutes of the province of Manitoba relating to education, and the memorials of certain persons complaining thereof, the questions so referred for hearing and consideration being as follows:

1. Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Victoria (1870), chapter 3, (Canada)?

2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to, or either of them?

3. Does the decision of the judicial committee of the privy council in the cases of Barrett *vs.* the City of Winnipeg, and Logan *vs.* the City of Winnipeg, dispose of or conclude the application for redress based on the contention that the rights of the Roman catholic minority which accrued to them after the union under the statutes of the province have been interfered with by the two statutes of 1890 complained of in the said petitions and memorials?

4. Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba?

5. Has his excellency the governor general in council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has his excellency the governor general in council any other jurisdiction in the premises?

6. Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a "system of separate or dissentient schools" within the meaning of subsection 3 of section 93 of the British North America Act, 1867, if said section 93 be found to be applicable to Manitoba, and if so, did the two acts of 1890, complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the governor general in council?

And the said case having come before this court on the fourth day of October, in the year of our Lord one thousand eight hundred and ninety-three, the Honourable J. J. Curran, Q.C., her majesty's solicitor general for the dominion of Canada appeared to submit the said case on behalf of the crown, Mr. Ewart, Q.C., appeared to argue the said case on behalf of the said petitioners and memorialists, and Mr. Wade, Q.C., appeared on behalf of the province of Manitoba, but not to argue the said case in the interest of the said province, whereupon this court directed the hearing of the said case to stand over, and in the exercise of the powers conferred by 54–55 Victoria, chapter 25, section 4, substituted for the Revised Statutes of Canada, chapter 135, section 37, appointed Mr. Christopher Robinson, Q.C., to argue the said case in the interest of the said province of Manitoba, and the said case coming on for hearing before this court on the seventeeth day of October, in the year of our Lord one thousand eight hundred and ninety-three, in the presence of counsel aforesaid, whereupon and upon hearing Mr. Ewart, Q.C., for the said petitioners and memorialists and Mr. Robinson, Q.C., who appeared pursuant to the direction of the court, in the interest of the said province of Manitoba, the honourable the solicitor general and Mr. Wade, Q.C., not desiring to be heard, this court was pleased to direct that the said case should stand over for consideration, and the same having come before this court this day, this court did state its opinion on the said questions so submitted as aforesaid, and the opinion of the said court, and the answers to the said questions, and the reasons therefor, will appear from the judgments delivered by their lordships, a true copy of which said judgments is hereunto annexed.

All which is respectfully certified under the seal of the supreme court of Canada.

ROBERT CASSELS,
Registrar.

In the matter of certain Statutes of the province of Manitoba relating to Education.

SIR HENRY STRONG, C.J.—This case has been referred to the court for its opinion by his excellency the governor general in council pursuant to the provisions of "An Act respecting the Supreme and Exchequer Courts," Revised Statutes of Canada, chapter 135, as amended by 54 and 55 Victoria, chapter 25, section 4.

Six questions are propounded, which are as follows:

"1. Is the appeal referred to in the said memorials and petitions (referring to certain petitions and memorials presented to the governor general in council) and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Victoria (1870), chapter 3, (Canada)?

"2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of subsections above referred to or either of them?

"3. Does the decision of the judicial committee of the privy council in the cases of Barrett *vs.* Winnipeg and Logan *vs.* Winnipeg dispose of or conclude the application for redress based on the contention that the rights of the Roman catholic minority which accrued to them after the union under the statutes of the province have been interferred with by the two statutes of 1890 complained of in the said petitions and memorials?

"4. Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba?

"5. Has his excellency the governor general in council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has his excellency the governor general in council any other jurisdiction in the premises?

"6. Did the acts of Manitoba passed prior to the session of 1890 confer on or continue to the minority a right or privilege in relation to education within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a system of 'separate or dissentient schools' within the meaning of subsection 2 of section 93 of the British North America Act, 1867, if said section 93 be found to be applicable to Manitoba; and, if so, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the governor general in council?"

To put it in a concise form, the questions which we are called upon to answer are whether an appeal lies to the governor general in council either under the British North America Act, 1867, or under the Dominion act establishing the province of Manitoba, against an act or acts of the legislature of Manitoba, passed in 1890, whereby certain acts or parts of acts of the same legislature, previously passed, which had conferred certain rights on the Roman catholic minority in Manitoba in respect of separate or denominational schools were repealed.

The matter was brought before the court by the solicitor general on behalf of the crown, but was not argued by him. On behalf of the petitioners and memorialists who had sought the intervention of the governor general, Mr. Ewart, Q.C., appeared. Mr. Wade, Q.C., appeared as counsel on behalf of the province of Manitoba when the matter first came on, but declined to argue the case, and the court then, in exercise of the powers conferred by 54 and 55 Vict., chap. 25, section 4, substituted for the Revised Statutes of Canada, chapter 135, section 37, requested Mr. Christopher Robinson, Q.C., the senior member of the bar practising before this court, to argue the case in the interest of the province of Manitoba, and on a subsequent day the matter was fully and ably argued by Mr. Ewart and Mr. Robinson.

The proper answer to be given to the questions propounded depends principally on the meaning to be attached to the words "any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education" in subsection 2 of section 22 of the Manitoba Act. Do these words include rights and privileges in relation to education which did not exist at the union, but (in the words of section 93, subsection 3 of the British North America Act) have been "thereafter established by the legislature of the province" or is this right or privilege

mentioned in subsection 2, section 22 of the Manitoba Act the same right or privilege which is previously referred to in sub-section 1, section 22 of the Manitoba Act, viz.: one which any class of persons had by law or practice in the province at the union, or a right or privilege other than one which the legislature of Manitoba had itself created? Section 93, subsection 3 of the British North America Act, 1867, is as follows: "Where in any province a system of separate or dissentient schools exists by law at the union or is thereafter established by the legislature of the province, an appeal shall lie to the governor general in council from any act or decision of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education."

It is important to contrast these two clauses of the acts in question, inasmuch as there is intrinsic evidence in the later act, that it was generally modelled on the imperial statute, the original Confederation Act, and the divergence in the language of the two statutes is therefore significant of an intention to make some change as regards Manitoba by the provisions of the later act.

It will be observed that the British North America Act, section 93, subsection 3, contains the words, "or is thereafter established by the legislature of the province," which words are entirely omitted in the corresponding section (section 22, subsection 2) of the Manitoba Act. Again the same subsection of the Manitoba Act gives a right of appeal to the governor general in council from the legislation of the province, as well as from any provincial authority, whilst by the British North America Act the right of appeal to the governor general is only to be from the act or decision of a provincial authority. I can refer this difference of expression in the two acts to nothing but to a deliberate intention to make some change in the operation of the respective clauses. I do not see why there should have been any departure in the Manitoba Act from the language of the British North America Act, unless it was intended that the meaning should be different. On the one hand it may well be urged that there was no reason why the provinces admitted to confederation should have been treated differently, why a different rule should prevail as regards Manitoba from that which by express words applied to the other provinces. On the other hand, there is, it seems to me, much force in the consideration that whilst it was reasonable that the organic law should preserve vested rights existing at the union from spoliation or interference, yet every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted. No doubt this right may be controlled by a written constitution which confers legislative powers, and which may restrict those powers and make them subject to any condition which the constituent legislators may think fit to impose. A notable instance of this is, as my brother King has pointed out, afforded by the constitution of the United States, according to the construction which the supreme court, in the well known "Dartmouth College Case," put upon the provision prohibiting the state legislatures from passing laws impairing the obligation of contracts. It was there held, with a result which has been found most inconvenient, that a legislature which had created a private corporation could not repeal their own enactment, granting the franchise, the reason assigned being that the grant of the right of franchise of a corporation was a contract. This has in practice been got over by inserting in such acts an express reservation of the right of the legislature to repeal its own act. But as it is a *prima facie* presumption that every legislative enactment is subject to repeal by the same body which enacts it, every statute may be said to contain an implied provision that it may be revoked by the authority which has passed it unless the right of appeal is taken away by the fundamental law, the over-riding constitution which has created the legislature itself. The point is a new one, but having regard to the strength and universality of the presumption that every legislative body has power to repeal its own laws, and that this power is almost indispensable to the useful exercise of legislative authority since a great deal of legislation is of necessity tentative and experimental, would it be arbitrary or unreasonable or altogether unsupported by analogy to hold as a canon of constitutional construction that such an inherent right to repeal its own acts cannot be deemed to be withheld from a legislative body, having its origin in a

written constitution, unless the constitution itself by express words takes away the right.

I am of opinion that in construing the Manitoba Act, we ought to proceed upon this principle and hold the legislature of that province to have absolute powers over its own legislation untrammelled by any appeal to federal authority unless we find some restriction of its rights in this respect in express terms in the constitutional act.

Then keeping the rule of construction just adverted to in view, is there anything in the terms of subsection 2 of section 22 of the Manitoba Act by which the right of appeal is enlarged and an appeal from the legislature is expressly added to that from any provincial authority, whilst in the British North America Act, section 93, subsection 3, the appeal is confined to one from a provincial authority only, which expressly or necessarily implies that it was the intention of those who framed the constitution of Manitoba, to impose upon its legislature any disability to exercise the ordinary powers of a legislature to repeal its own enactments? I cannot see that it does, and I will endeavour to demonstrate the correctness of this opinion. It might well have been considered by the parliament of the Dominion in passing the Manitoba Act that the words "any provincial authority" did not include the legislature. Then, assuming it to have been intended to conserve all vested rights, "rights or privileges" existing by law or practice at the time of "the union" and to exclude or subject to federal control, even legislative interference with such pre-existent rights or privileges, this prohibition or control would be provided for by making any act or decision of the legislature so interfering the subject of appeal to the governor general in council.

If, however, the words of section 93, subsection 3, "or is thereafter established by the legislature" had been repeated in section 22, the legislature would have been in express and unequivocal terms restrained from repealing laws of the kind in question which they had themselves enacted, except upon the condition of a right to appeal to the governor general. If it was intended not to do this, but only to restrain the legislature of Manitoba from interfering with "rights and privileges" of the kind in question existing at the union, this end would have been attained by just omitting altogether from the clause the words "or shall have been thereafter established by the legislature of the province." This was done. Next, it is clear that in interpreting the Manitoba Act the words "any provincial authority" do not include the legislature, for that expression is there used as an alternative to the "legislature of the province."

It is not to be presumed that Manitoba was intended to be admitted to the union upon any different terms from the other provinces, or with rights of any greater or less degree than the other provinces. Some difference may have been inevitable owing to the difference in the pre-existing conditions of the several provinces. It would be reasonable to attribute any difference in the terms of union and in the rights of the province as far as possible to this, and by interpretation to confine any variation in legislative powers and other matters to such requirements as were rendered necessary by the circumstances and condition of Manitoba at the time of the union.

Now, let us see what would be the effect of the construction which I have suggested of both acts, the British North America Act, section 93, and the Manitoba Act, section 22, in their practical application to the different provinces as regards the right of provincial legislatures to interfere with separate or denominational schools to the prejudice of a Roman catholic or protestant minority.

First, then, let us consider the cases of Ontario and Quebec, the two provinces which had by law denominational schools at the union. In these provinces any law passed by a provincial legislature impairing any right or privilege in respect of such denominational schools, would, by force of the prohibition contained in sub-section 3 of section 93 of the British North America Act, be *ultra vires* of the legislature and of no constitutional validity.

Should the legislatures of these provinces (Ontario and Quebec) after confederation have conferred increased rights or privileges in relation to education on

minorities, I see nothing to hinder them from repealing such acts to the extent of doing away with the additional rights and privileges so conferred by their own legislation without being subject to any condition of appeal to federal authority.

What is meant by the term "provincial authority"? The parliament of the Dominion, as shown by the Manitoba Act, holds that it does not include the legislature, for in subsection 2 of section 22 they use it as an alternative expression and so expressly distinguish it from the legislature. It is true the British North America Act did not emanate from the Dominion parliament, but nevertheless the construction which that parliament has put on the British North America Act if not binding on judicial interpreters is at least entitled to the highest respect and consideration. Secondly, the words "provincial authority" are not apt words to describe the legislature, and in order that a provincial legislature should be subjected to an appeal when it merely attempts to recall its own acts, the terms used should be apt, clear and unambiguous. To return, then, to the cases of Ontario and Quebec, should any "provincial authority" not including in these words the legislature, but interpreting the expression as restricted to administrative authorities (without at present going so far as to say it included courts of justice) by any act or decision affect any right or privilege, whether derived under a law or practice existing at the time of confederation, or conferred by a provincial statute since the union, still remaining unrepealed and in force, that would be subject to an appeal to the governor general.

Secondly, as regards the provinces of Nova Scotia and New Brunswick, those provinces not having had any denominational schools at the time of the union, there is nothing in their case for subsection 1 of section 93 to operate upon. Should either of these provinces by after-confederation legislation create rights or privileges in favour of protestant or catholic minorities in relation to education, then so long as these statutes remained unrepealed and in force an appeal would lie to the governor general from any act or decision of a provincial administrative authority affecting any of such rights or privileges of a minority, but there would be nothing to prevent the legislatures of the provinces now under consideration from repealing any law which they had themselves enacted conferring such rights and privileges, nor would any act so repealing their own enactments be subject to appeal to the governor general in council.

Thirdly, we have the case of the province of Manitoba. Here, applying the construction before mentioned, the provincial powers in relation to education would be not further restricted but somewhat enlarged in comparison with those of the other provinces. Acting upon the presumption that in the absence of express words in the act of the Dominion parliament which embodies the constitution of the provinces withholding from the legislature of the province the normal right of altering or repealing its own acts, we must hold that it was not the intention of parliament so to limit the legislature by the organic law of the province. What, then, is the result of the legislation of the Dominion as regards Manitoba? What effect is to be given to section 22 of the Manitoba Act? By the first subsection any law of the province prejudicing any right or privilege with respect to denominational schools in the province existing at the union is *ultra vires* and void. This clause was the subject and the only subject of interpretation in Barrett *vs.* Winnipeg, and the point there decided was, that there was no such right or privilege as was claimed in that case existing at the time of the admission of the province. Had any such right or privilege been found to exist, there is nothing in the judgment of the privy council against the inference that legislation impairing it would have been unconstitutional and void. That decision has, in my opinion, but a very remote application to the present case. The second subsection of section 22 of the Manitoba Act is as follows: "An appeal shall lie to the governor general in council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education." I put aside as entirely irrelevant here the question whether it was or was not intended by this subsection 2 to confer on the privy council of the Dominion appellate jurisdiction from the provincial judiciary, a question, the decision of which I may say in passing might

well be influenced by the consideration that the power given to parliament by the British North America Act, to create federal courts had not at the time of the passage of the Manitoba Act been exercised. The first subject of appeal is then any act or decision of the legislature of the province affecting any right or privilege of the minority in respect of the matters in question. Now, if we are to hold, as I am of opinion we must hold, that it was not the intention of parliament by these words so to circumscribe the legislative rights conferred by them on Manitoba as to incapacitate that legislature from absolutely and without any subjection to federal control repealing its own enactments and thus taking away rights which it had itself conferred, the right of appeal to the governor general against legislative acts must be limited to a particular class of such acts, viz., to such as might prejudice rights and privileges not conferred by the legislature itself, but rights and privileges which could only have arisen before confederation, being those described in the first subsection of section 22. That we must assume in the absence of express words that it was not the intention of parliament to impose upon the Manitoba legislature a disability so anomalous as an incapacity to repeal its own enactments, except subject to an appeal to the governor general in council, and possibly the intervention of the Dominion parliament, as a paramount legislature, is a proposition I have before stated. Therefore the right of appeal to the governor general in council must be confined to acts of the legislature affecting such rights and privileges as are mentioned in the first subsection, viz., those existing at the union when belonging to a minority, either protestant or catholic. Then there would also be the right of appeal from any provincial authority.

I will assume that the description "provincial authority" does not apply to the courts of justice. Then these words "provincial authority" could not, as used in this subsection 2 of section 22 of the Manitoba Act, have been intended to include the provincial legislature, for it is expressly distinguished from it, being mentioned alternatively with the legislature: "An appeal shall lie from any act or decision of the legislature or of any provincial authority" is the language of the section. It must, then, apply to the provincial executive or administrative authorities. No doubt an appeal would lie from their acts or decisions upon the ground that some right or privilege existing at the date of the admission of the province to the federal union was thereby prejudiced. In this respect Manitoba would be in the same position as Ontario and Quebec. Unlike the cases of those provinces and also unlike the case of the two maritime provinces, Nova Scotia and New Brunswick, there would not, however, in the case of Manitoba, be an appeal to the governor general in council from the act or decision of any "provincial authority" upon the ground that some right or privilege not existent at the time of the union, but conferred subsequently by legislation, had been violated. This construction must necessarily result from the right of appeal against acts or decisions of provincial authorities and against acts or decisions of the legislature being limited to such as prejudiced the same class of rights or privileges. The wording of this subsection 2 shows clearly that only one class of rights or privileges could have been meant, and that the right of appeal was, therefore, to arise upon an invasion of these, either by the legislature or by a provincial authority. Then, as the impossibility of holding that it could have been intended to impose fetters on the legislature and to incapacitate it from absolutely repealing its own acts requires us to limit the appeal against its enactments to acts affecting rights and privileges existing at the union, it must follow that the right of appeal must be, in like manner, limited as regards acts or decisions of provincial authorities. This, however, although it makes a difference between Manitoba and the other provinces, is not a very material one. The provincial authorities would, of course, be under the control of the courts. They could, therefore, be compelled by the exercise of judicial authority to conform themselves to the law. Much greater would have been the difference between Manitoba and the other provinces if we were to hold that whilst, as regards the provinces of Nova Scotia and New Brunswick, their legislatures could enact a separate school law one session and repeal it the next, without having their repealing legislation called in question by appeal; and whilst, as regards Ontario and Quebec, although rights and privileges existing

at confederation were made intangible by their legislatures, yet any increase or addition to such rights and privileges which these legislatures might grant could be withdrawn by them at their own pleasure subject to no federal revision, yet that the legislation of Manitoba on the same subject should be only revocable subject to the revisory power of the governor general in council.

I have thus endeavoured to show that the construction I adopt has the effect of placing all the provinces virtually in the same position, with an immaterial exception, in favour of Manitoba, and it for the purpose of demonstrating this, that I have referred to appeals from the acts and decisions of provincial authorities which are not otherwise in question in the case before us.

That the words "any provincial authority" in the third subsection of section 93 of the British North America Act do not include the legislature is a conclusion which I have reached, not without difficulty. In interpreting the Manitoba Act, however, what we have to do is to ascertain in what sense the Dominion parliament, adopting the same expression in the Manitoba Act, understood it to have been used in the British North America Act.

That they understood these words not to include the provincial legislature, is apparent from section 22, subsection 2 of the Manitoba Act, wherein the two expressions "provincial authority" and "legislature of the province" are used in the alternative, thus indicating that in the intendment of parliament, they meant different subjects of appeal.

Again, why were the words contained in the third subsection of section 93 of the British North America Act "or is thereafter established by the legislature of the province" omitted when that section was, in other respects, transcribed in the Manitoba Act? The reason, it appears to me, is plain. So long as these words stood with the context they had in the British North America Act they did not in any way tie the hands of the provincial legislatures as regards the undoing, alteration or amendment of their own work, for the words "any provincial authority" did not include the legislature. But when, in the Manitoba Act, the Dominion parliament thought it advisable for the better protection of vested rights, "rights and privileges" existing at the union to give a right of appeal from the legislature to the governor general in council, it omitted the words "or is thereafter established by the legislature of the province" with the intent to avoid placing the provincial legislature under any disability or subjecting it to any appeal as regards the repeal of its own legislation, which would have been the effect if the third subsection of section 93 of the British North America Act had been literally re-enacted in the Manitoba Act with the words "of the legislature of the province" interpolated as we now find them in subsection 2 of the latter act.

This seems to me to show conclusively that the words "rights or privileges" in subsection 2 of section 22 were not intended to include rights and privileges originating under provincial legislature since the union, and that the legislature of Manitoba is not debarred from exercising the common legislative right of abrogating laws which it has itself passed relating to denominational or separate schools or educational privileges, nor is such repealing legislation made subject to any appeal to the governor general in council.

In my opinion, all the questions propounded for our opinion must be answered in the negative.

Certified a true copy.

C. H. MASTERS, *Asst. Rep. S.C.C.*

In the matter of certain Statutes of the province of Manitoba relating to Education.

FOURNIER, J.—By the statute 33 Vict., chapter 3, section 2, the provisions of the British North America Act, except so far as the same may be varied by the said act, are made applicable to the province of Manitoba in the same way and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces united by the British North America Act. This act was imperialized, so to speak, by 34 Vict., chapter 38 (imp.), which declares

that 32 and 33 Vict., chapter 3 (D.), shall be deemed to have been valid and effectual for all purposes whatsoever.

If we are now called upon to construe certain provisions of this statute, it seems to me that the same consideration will apply as if these sections appeared in the British North America Act itself under the heading "Manitoba," and therefore, as stated by the late chief justice of this court, Sir W. Richards, in the case of Severn *vs.* The Queen (2 Can., S.C.R., 70): "In deciding important questions arising under the act passed by the imperial parliament for federally uniting the provinces of Canada, Nova Scotia and New Brunswick, we must consider the circumstances under which that statute was passed, the condition of the different provinces, their relation to one another, as well as the system of government which prevailed in those provinces and countries.

For convenience, therefore, I will place in parallel columns the sections of the Manitoba school act and the corresponding sections of the British North America Act, upon which we are required to give an answer.

British North America Act.	*Manitoba Act.*
Section 93.—In and for the province the legislature may exclusively make laws in relation to education, subject and according to the following provisions:	Section 22.—In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:
1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union.	1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice, in the province at the union.
2. All powers, privileges and duties at the union, by law conferred and imposed in Upper Canada on the separate schools and school trustees of the queen's Roman catholic subjects, shall be and the same are hereby extended to the dissentient schools of the queen's protestant and Roman catholic subjects in Quebec.	
3. Where in any province a system of separate or dissentient schools exists by law at the union, or it is thereafter established by the legislature of the province, an appeal shall lie to the governor general in council from any act or decision of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education.	2. An appeal shall lie to the governor general in council from any act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education.
4. In case any such provincial law as from time to time seems to the governor general in council requisite for the due execution of the provisions of this section is not made, or in case any decision of the governor general in council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make remedial laws	3. In case any such provincial law as from time to time seems to the governor general in council requisite for the due execution of the provisions of this section is not made, or in case any decision of the governor general in council on any appeal under this section is not duly executed by the proper authority in that behalf, then, and in every such case, and as far only as the circumstances of each case may require, the parliament of Canada may make remedial laws for the due execution of

for the due execution of the provisions of this section and of any decision of the governor general in council under this section.

the provisions of this section and of any decision of the governor general in council under this section.

What was the existing state of things in the territory then being formed into the province of Manitoba? A rebellion, as I have already stated in the case of Barret *vs* Winnipeg, had thrown the people into a strong and fierce agitation, inflamed religious and national passions, caused the greatest disorder, which rendered necessary the intervention of the federal government.

As matters then stood, on the 2nd March, 1870, the government of Assiniboia, in order to pacify the inhabitants, appointed the Rev. Mr. Ritchot and Messrs. Black and Scott as joint delegates to confer with the government at Ottawa and negotiate the terms and conditions upon which the inhabitants of Assiniboia would consent to enter confederation with the provinces of Canada.

Mr. Ritchot was instructed to immediately leave with Messrs. Black and Scott for Ottawa in view of opening negotiations on the subject of their mission with the government at Ottawa.

When they arrived at Ottawa, the three delegates, Messrs Richot, Black and Scott received, on the 25th April, 1870, from the Hon. Mr. Howe, the then secretary of state for the dominion of Canada, a letter informing them that the Hon. Sir John A. Macdonald and Sir George Cartier had been authorized by the government of Canada to confer with them on the subject of their mission, and that they were ready to meet them.

The Rev. Mr. Ritchot was the bearer of the conditions upon which they were authorized to consent for the inhabitants of Assiniboia to enter confederation as a separate province. These facts appear in exhibit L, Sessional Papers of Canada, 1893, 33*d*, and in exhibit N of the same Sessional Paper we see that the following conditions, articles 5 and 7, read as follows:—

5. That all properties, all rights and privileges possessed be respected, and the establishing and settlement of the customs, usages and privileges to be left to the sole decision of the local legislature.

7. That the schools shall be separate, and that the moneys for schools shall be divided between the several denominations *pro rata* of their respective populations.

Now, after negotiations had been going on and despatches and instructions from the imperial government to the government of Canada on the subject of the entrance of the province of Manitoba into the confederation had been received, the Manitoba Constitutional Act was prepared and section 22 inserted as a satisfactory guarantee for their rights and privileges in relation to matters of education as claimed by the above articles 5 and 7. And, until 1890, the inhabitants of the province of Manitoba enjoyed these rights and privileges under the authority of this section and local statutes passed in conformity therewith.

Now, it seems by the decision of the judicial committee of the privy council in the case of Barrett *vs.* Winnipeg, that the delegates of the North-west and the parliament of Canada, although believing that the inhabitants of Assiniboia had before the union "by law or practice" certain rights and privileges with respect to denominational schools, for the words used in subsection 1 of this section 22 are "which any class have by law or practice in the province at the union," had in point of fact no such right or privilege by law with respect to denominational schools, and therefore that section 1 is, so to speak, wiped out of the Manitoba Constitutional Act.

But if the parties agreeing to these terms of union were in error in supposing they had by law or practice, prior to the union, certain rights or privileges they certainly were not in error in trusting that the provincial legislature which was being created would forthwith secure, by law and in accordance with article 5 of the bill of rights, separate schools, and that the moneys would be divided between the protestant and catholic denominations *pro rata* to their respective populations, as claimed by the above articles 5 and 7, and that once established, such rights and privileges so secured by an act of the legislature would at least be in the same position as rights secured to minorities in the provinces of Quebec and Ontario under

section 93 of the British North America Act, and subsections 2 and 3 were inserted in the act so that they might be protected by the governor general against any subsequent legislation by either a protestant or catholic majority in after years.

In the present reference, being again called upon to construe this same section 22, but as if subsection 1 was repealed or wiped out by judicial authority, we must, I think, take into consideration the historical fact that the Manitoba Act of 1870 was the result of the negotiations with parties who agreed to join and form part of the confederation as if they were the inhabitants of one of the provinces originally united by the British North America Act, and we must credit the parliament of Canada with having intended that the words "an appeal shall lie to the governor general in council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education" (which are also the words used in the 93rd section of the British North America Act) should have some effect. The only meaning and effect I can give them is that they were intended as an additional guarantee or protection to the minority, either protestant or catholic, whichever it might happen to be, that the laws which they knew would be enacted immediately after the union by their own legislature in reference to education would be in accordance with the terms and conditions upon which they were entering the union; this guarantee was given so as to prevent later on interference with their rights and privileges by subsequent legislation without being subject to an appeal to the governor general in council, should such subsequent act of the legislature affect any right or privilege thus secured to the protestant or catholic minority by their own legislature. In my opinion, the words used in subsection 2, "an appeal shall lie from any act of the legislature" necessarily mean from any statute which the legislature has power to pass in relation to education. There is no necessity of appealing from statutes which are *ultra vires*, for the assumption of any unauthorized power by any local legislature under our system of government is not remedied by appeals to the governor general in council, but by courts of justice. Then, as to the words "right or privilege" in this subsection 2, they refer to some right or privilege in relation to education to be created by the legislature which was being brought into existence and which when once established might thereafter be interfered with at the hand of a local majority so as to affect the protestant or catholic minority in relation to education. It is clear, therefore, that the governor general in council has the right of entertaining an appeal by the British North America Act as well as by subsection 2 of section 22 of the Manitoba Act. He has also the power of considering the application upon its merits. When the application has been considered by him upon its merits, if the local legislature refuses to execute any decision to which the governor general in council has arrived in the premises, the Dominion government may then, under subsection 3, section 22 of the Manitoba Act, pass remedial legislation for the due execution of his decision.

In construing as I have done the words of subsection 2 of the Manitoba Constitutional Act, which is, as regards an appeal to the governor general in council, but a reproduction of subsection 3 of section 93 of the British North America Act, that the clear unequivocal and comprehensive words "from any act or decision of the legislature of the province" are added, I am pleased to see that I am but concurring in the view expressed by Lord Carnarvon in the house of lords on the 19th February, 1867, when speaking of this right of appeal to be granted to minorities when a local act might affect rights or privileges in matters of education, as the following extract from Hansard's Parliamentary Debates, 3rd series, February 19th, 1867, shows: "LORD CARNARVON.—Lastly, in the 93rd clause, which contains the exceptional provisions to which I referred, your lordships will observe some rather complicated arrangements in reference to education. I need hardly say that the great question gives rise to nearly as much earnestness and division of opinion on that as on this side of the Atlantic. This clause has been framed after long and anxious controversy, in which all parties have been represented, and on conditions to which all have given their consent. It is an understanding which, as it only concerns the local interests affected, is not one that parliament would be willing to

disturb, even if in the opinion of parliament it were susceptible of amendment; but I am bound to add, as the expression of my own opinion, that the terms of the agreement appear to me to be equitable and judicious. For the object of the clause is to secure to the religious minority of one province the same rights, privileges and protection which the religious minority of another province may enjoy. The Roman catholic minority of Upper Canada, the protestant minority of Lower Canada, and the Roman catholic minority of the maritime provinces will thus stand on a footing of entire equality. But in the event of any wrong at the hand of the local majority, the minority have a right of appeal to the governor general in council, and may claim the application of any remedial laws that may be necessary from the central parliament of the confederation."

This being so, the next point of inquiry is whether the acts of 1890, of Manitoba, affect any right or privilege secured to the catholic minority in matters of education after the union, for we have now nothing to do with the inquiry whether the catholic minority had at the time of the union any right by law, that point having been decided adversely to their contention by the decision of the privy council in the case of Barrett *vs.* Winnipeg.

By referring to the legislation from the date of the union to 1890, it is evident that the catholics enjoyed the immunity of being taxed for other schools than their own, the right of organization, the right of self government, in this school matter, the right of taxation of their own people, the right of sharing in government grants for education, and many other rights under the statute of a most material kind. All these rights were swept away by the act of 1890, as well as the properties they had acquired under these acts with their taxes and their share of the public grants for education. Could the prejudice caused by the act of 1890 be greater than it has been? The scheme that runs through the acts of 1871 and 1881 up to 1890, as Lord Watson, of the privy council, is reported to have so concisely stated on the argument of the case of Barrett *vs.* Winnipeg, which is printed in the Sessional Papers of Canada, 1893, appears to have been that: "no ratepayers shall be taxed for contribution towards any school except one of his own denomination," and I will add that this scheme is clearly pointed out in articles 5 and 7 of the conditions above already referred to, which were the basis of the constitutional act.

Now, is this a legal right or privilege enjoyed by a class of persons? In this case the immunity from contributing to any schools other than one of its own denomination was acquired by the catholic minority qua-catholics by statute. Catholics certainly at the time the legislation was passed represented a class of persons comprising at least one-third of the inhabitants of the province of Manitoba.

After reading the able judgment delivered in the case of Barrett *vs.* Winnipeg, it is unnecessary for me to show by authority that the right so acquired by the catholic minority after the union by the act of 1871, was a legal right, and that if it is shown by subsequent legislation enacted by the legislature of the province of Manitoba that there has been any interference with such right, then I am of opinion that such interference would come within the very words of this section 22 of the Manitoba Constitutional Act, which gives a right of appeal to the governor general in council from an act of the legislature (words which are not in section 93 of the British North America Act, but are in subsection 2 of section 22 of the Manitoba Act), affecting a right acquired by the Roman catholic minority of the queen's subjects in relation to education.

The only other question submitted that I need refer to is the fourth question: Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba? The answer to this question is to be found in the second section of the Manitoba Act (33 Vict.) which says, from and after the said date "the provision of the British North America Act shall apply, except those parts thereof, which are in terms made, or by reasonable intendment, may be held to be, specially applicable to, or only to affect one or more but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this act and be applicable to the province of Manitoba in the same way, and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces originally united by the said act."

The Manitoba Act has not varied the British North America Act though subsection 2 of section 22 has a somewhat more comprehensive wording than the subsection 3 of section 93 of the British North America Act, in relation to appeal in educational matters. A statute does not vary or alter if it merely makes further provision; it is simply an addition to it. The second subsection is wider, but does not vary at all from the third subsection of the British North America Act, save in this: that there is addition to it, that it is exclusive, and goes beyond it by adding the words "and from any act of the legislature." The third subsection of the British North America Act provides that in two cases there is to be an appeal.

There is nothing inconsistent in the Manitoba Act, which says that in all cases there shall be an appeal; it goes beyond the British North America Act, it does not vary it, it leaves it as it is and adds to it.

We see by the opinion expressed by some of the lords of the privy council how far the right of appeal extended under the section 2 of the Manitoba Act, for in the argument on that question before the privy council, Sessional Papers, Nos. 33*a*, 33*b*, 1893, p. 134, I find that:

Mr. RAM, (counsel on behalf of Mr. Logan in the case of Winnipeg *vs.* Logan) said: "I venture to think that under subsection 2 what was contemplated was this: that, apart from any question of *ultra vires* or not, if a minority said 'I am oppressed' that was the party who had to come under that subsection 2 and appeal to the government."

Lord HANNAN added: "It has a right to appeal against any act of the legislature."

Lord SHAND.—"Even *intra vires.*"

This being also my opinion, I will only add that, having already stated that I think that we should read the Manitoba Constitutional Act in the light of the British North America Act, and that it was intended, as regards all civil rights in educational matters, to place the province of Manitoba on the same footing as the provinces of Quebec and Ontario, and that subsection 1 of section 22 having been enacted for the purpose of protecting rights held by law prior to the union, but which have been declared not to exist, I am of opinion that subsection 2 provides for an appeal to the governor general in council, by memorial or otherwise, on the part of the Roman catholic minority, contending that the two acts of the legislative assembly of Manitoba, passed in 1890, on the subject of education are subversive to the right and privilege of Roman catholic ratepayers not to be taxed for contribution towards schools, except one of their own denomination, and that such right had been acquired by statute subsequent to the union.

For the above reasons, I answer the questions submitted by his excellency the governor general in council, as follows:

1. Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Victoria (1870), chapter 3 (Canada)? Yes.

2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to, either of them? Yes.

3. Does the decision of the judicial committee of the privy council in the cases of Barrett *vs.* the City of Winnipeg and Logan *vs.* the City of Winnipeg, dispose of or conclude the application for redress based on the contention that the rights of the Roman catholic minority, which accrued to them after the union under the statutes of the province, have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials? No.

4. Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba? Yes.

5. Has his excellency the governor general in council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has his excellency the governor general in council any other jurisdiction in the premises? Yes.

6. Did the acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education" within the meaning of sub-section 2 of section 22 of the Manitoba Act, or establish a system of separate or dissentient schools "within the meaning of sub-section 3 of section 93 of the British North America Act, 1867, if said section 93 be found to be applicable to Manitoba; and, if so, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the governor general in council? Yes.

Certified true copy.

G. DUVAL,
Reporter, S. C. C.

In the matter of certain Statutes of the province of Manitoba relating to Education.

TASCHEREAU, J.—I doubt our jurisdiction on this reference or consultation. Is section 4 of 54-55 Vict., c. 25, which purports to authorize such a reference to this court for hearing "or" consideration, *intra vires* of parliament? By which section of the British North America Act is parliament empowered to confer on this statutory court any other jurisdiction than that of a court of appeal under section 101 thereof? This court is evidently made, in the matter, a court of first instance, or rather, I should say, an advisory board of the federal executive substituted *pro hac vice*, to the law officers of the crown, and not performing any of the usual functions of a court of appeal, nay, of any court of justice whatever. However, I need not at present further investigate this point. It has not been raised and a similar enactment to the same import has already been acted upon. That is not conclusive, it is true, but our answers to the questions submitted will bind no one, not even those who put them; nay, not even those who give them; no court of justice, not even this court. We give no judgment, we determine nothing, we end no controversy, and, whatever our answers may be, should it be deemed expedient at any time by the Manitoba executive to impugn the constitutionality of any measure that might hereafter be taken by the federal authorities against the provincial legislation, whether such measure is in accordance with or in opposition to the answers to this consultation, the recourse, in the usual way, to the courts of the country, remains open to them. That is, I presume, the consideration and a very legitimate one, I should say, upon which the Manitoba executive acted by refraining to take part in the argument on the reference, a course that I would have not been surprised to see followed by the petitioners, unless indeed they are assured of the interference of the federal authorities, should it eventually result from this reference that constitutionally the power to interfere with the provincial legislation as prayed for exists. For, if, as a matter of policy, in the public interest, no action is to be taken upon the petitioners' application, even if the appeal lies, the futility of these proceedings is apparent.

Assuming, then, that we have jurisdiction, I will try to give as concisely as possible the reasons upon which I have based my answers to the questions submitted.

In the view I take of the application made to his excellency the governor general in council by the catholics of Manitoba, I think it better to introvert the order of the questions put to us, and to answer first the fourth of these questions, that is: whether subsection 3 of section 93 of the British North America Act applies to Manitoba. To that question, the answer, in my opinion, must be in the negative. That section of the British North America Act applies to every one of the provinces of the Dominion, with the exception, however, of Manitoba, for the reason that, for Manitoba in its special charter, the subject is specifically provided for by section 22 thereof. The maxims *lex posterior derogat priori*, and *speciala generalibus derogant*, have both here, it seems to me, their application. If it had been intended to purely and simply extend the operation of that section 93 of the British North America Act to Manitoba, section 22 of its charter would not have been enacted. The course since pursued for British Columbia and Prince Edward Island would have been followed. But here we see a different course pursued, we have to assume that a

difference in the law was intended. I cannot see any other reason for it, and none has been suggested. True it is that the words " or practice " in subsection 1 of section 22 are an addition in the Manitoba charter that the Dominion parliament desired to specially make to the analogous provision of the British North America Act, but that was no reason to word subsection 2 thereof so differently as it is from subsection 3 of section 93 of the British North America Act.

Then, this difference may be easily explained, though its consequences may not have been foreseen. I speak cautiously and mindful that I am not here allowed to controvert or even doubt anything that has been said on the subject by the privy council. It is evident, to my mind, that it was simply because it was assumed by the Dominion parliament that separate or denominational schools had previously been in that region, and were then, at the union, the basis and principle of the educational system, and with the intention of adapting such system to the new province, or rather of continuing it as found to exist, that, in the Union Act of 1870, the words of subsection 3 of section 93 of the British North America Act "where in any province a system of separate or dissentient schools exists by law, at the union, or is thereafter established by the legislature of the province" were stricken out as unnecessary and inapplicable to the new province. And I do not understand that the privy council denies to the petitioners their right to separate schools.

However, the reason of this difference between the constitution of the province and the British North America Act cannot, in my view of the question, bring much assistance in the present investigation; the fact remains whatever may have been the reason for it, that no appeal is given to the minority, in Manitoba, in relation to the rights and privileges conceded to them since the union as distinguished from those in existence at the union. They have no rights but what is left to them by the judgment in the Barrett case; and if I do not misunderstand that judgment, the appeal they now lay claim to is not, as a logical inference, thereby left to them.

And in vain now, to support their appeal, would they urge that the statute so construed is unreasonable, unjust, inconsistent and contrary to the intentions of the law giver; uselessly would they contend that to force them to contribute pecuniarily to the maintenance of the public, non-catholic schools, is to so shakle the exercise of their rights as to render them illusory and fruitless, or that to tax, not only the property of each and every one of them individually but even their school buildings for the support of the public schools, is almost ironical; uselessly would they demonstate the utter impossibility for them to efficaciously provide for the organization, maintenance and management of separate schools and the essential requirements of a separate school system without statutory powers and the necessary legal machinery; ineffectively would they argue that to concede their right to separate schools, and withal deprive them of the means to exercise that right, is virtually to abolish it, or to leave them nothing of it but a barren theory. With all these and kindred considerations, we, here, in answering this consultation, are not concerned. The law has authoritatively been declared to be so, and with its consequences we have nothing to do. *Dura lex, sed lex. Judex non constituter ad leges reformandas. Non licet judicibus de elegibus judicare, sed secundum ipsas.* The Manitoba legislation is constitutional, therefore it has not affected any of the rights or privileges of the minority, therefore the minority has no appeal to the federal authority. The Manitoba legislature had the right and power to pass that legislation, therefore any interference with that legislation by the federal authority would be *ultra vires* and unconstitutional.

By an express provision of the British North America Act of 1871, it must not be lost sight of, the Dominion parliament has not the power to, in any way, alter the Manitoba Union Act of 1870.

For these reasons I would answer negatively the fourth of the questions submitted, and say that, in my opinion, subsection 3 of section 93 of the British North America Act does not apply to Manitoba.

I take up now the first of these questions: does the right of appeal claimed by the petitioners exist under section 22 of the Manitoba Act? and here, again, in my opinion, the answer must be in the negative, for the reason that it is conclusively

determined by the judgment of the privy council that the Manitoba legislation does not prejudicially affect any right or privilege that the catholics had by law or practice at the union, and if their rights and privileges are not affected, there is no appeal. The rights or privileges mentioned in subsection 2 of section 22 are the same rights and privileges that are mentioned in subsection 1, that is to say, those existing at the union, upon which subsection 3 provides for the interference, in certain cases, of his excellency the governor general in council, and it is as to such rights or privileges only that an appeal is given. The appeal given in the other provinces, by section 93 of the British North America Act, as to the rights or privileges conferred on a minority, after the union, is, as I have remarked, left out of the Manitoba constitution. Assuming, however, that the Manitoba constitution is wide enough to cover an appeal by the minority, upon the infringement of any of their rights or privileges created since the union, or assuming that section 93 of the British North America Act, subsection 3, applies to Manitoba, I would be inclined to think that, by the *ratio decidendi* of the privy council, there are no rights or privileges of the catholic minority that are infringed by the Manitoba legislation so as to allow of the exercise of the powers of the governor general in council in the matter, as the Manitoba statutes must now be taken not to prejudicially affect any right or privilege whatever enjoyed by the catholic community. It would seem, no doubt, by the language of both section 93 of the British North America Act and of section 22 of the Manitoba charter, that there may be provincial legislation which, though *intra vires*, yet might affect the rights or privileges of the minority so as to give them the right to appeal to the governor in council. For it cannot be of *ultra vires* legislation that an appeal is given. And the petitioners, properly disclaiming any intention to base their application on the unconstitutionality of the Manitoba statutes, even for infringement of rights conferred upon them since the union, urge that, though the privy council has determined that the legislation in question does not affect their rights existing at the union so as to render it *ultra vires*, yet that it does affect the rights conferred upon them by the provincial legislature since the union so as to give them, though *intra vires*, an appeal to the governor in council. I fail to see, however, how this ingenious distinction, for which I am free to admit both the British North America Act and the Manitoba special charter give room, can help the petitioners. I assume, here, that the petitioners have an appeal upon rights or privileges conferred upon them since the union as contradistinguished from their rights previously in existence. The case is precisely the same as if the present appeal was as to their rights existing at the union. They might argue that though the privy council has held this legislation to have been *intra vires*, yet their right to appeal subsists, and, in fact, exists because it is *intra vires*. But what would be their ground of appeal? Because the legislation affects the rights and privileges they had at the union. And the answer would be one fatal to their appeal as it was to their contentions in the Barrett case, that none of these rights and privileges have been illegally affected. Now, the rights and privileges they lay claim to under the provincial legislation anterior to 1890 are, with the additions rendered necessary by the political organization of the country, to enable them to exercise these rights the same in principle that they had by practice at and before the union, and which were held by the privy council not to be illegally affected by the legislation of 1890.

And I am unable to see how, on the one hand, this legislation might be said to affect those rights so as to support an appeal, and on the other hand not to affect the same rights so as to render it *ultra vires*.

The petitioners, it seems to me, would virtually renew their impeachment of the constitutionality of the Manitoba legislation of 1890 upon another ground than the one taken in the Barrett case, namely, upon the rights conferred upon them since the union, whilst the controversy in the Barrett case was limited to their rights as they existed at the union. But that legislation, as I have said, is irrevocably held to have been *intra vires*, and it is not open to the petitioners to argue the contrary, even upon a new ground. And if it is *intra vires*, it cannot be that it has illegally affected any of the rights or privileges of the catholic minority, though it may be

prejudicial to such rights. And if it has not illegally affected any of those rights or privileges, they have no appeal to the governor general in council.

It has been earnestly urged on the part of the petitioners in their attempt to distinguish the two cases that, in the Barrett case, it was only their liability to assessment for the public schools that was in issue, and consequently that the decision of the privy council, binding though it be, does not preclude them from now taking, on appeal from the provincial legislation of 1890, the ground that this legislation sweeps away the statutory powers conceded to them under the previous statutes and without which their establishment and administration of a separate school system is impracticable. But here, again, it must necessarily be on the ground that their rights and privileges, or some of their rights and privileges, have been prejudicially affected, that they have to rest their case, and from that ground they are irrevocably ousted by the judgment of the privy council, where not only the assessment clauses thereof, more directly in issue, but each and every one of the enactments of the statute impugned were, as I read that judgment, held to have been and to be *intra vires.*

Were it otherwise, and could the question be treated as *res integra*, it might have been possible for the petitioners to establish that they are entitled to the appeal claimed on that ground, namely, that the statutes of 1890, by taking away the rights and privileges of a corporate body vested with the powers essential to the organization and maintenance of a school system that had been granted to them by the previous statutes, are subversive of those rights and privileges and prejudicially affect them.

They might cogently urge in support of that proposition, and might, perhaps, have succeeded to convince me that to take away a right, to cancel a grant, to repeal the grant of a right to revoke a privilege, prejudicially affects that grant, prejudicially, injuriously affects that privilege. They might also perhaps have been able to convince me that the license to own real estate, the authorization to issue debentures, to levy assessments, the powers of a corporation, that had been granted to them, constituted for them rights and privileges.

And to the objection that no appeal lies under section 22 of the Manitoba charter, but upon rights existing at the union, they might perhaps have successfully answered either that section 93 of the British North America Act extends to Manitoba, or, if not, that the legislation of Manitoba in the matter, since the union, prior to 1890, should be construed as declaratory of their right to separate schools, or a legislative admission of it, a legislation required merely to secure to them the means whereby to exercise that right, and that, consequently, their appeal relates back to a right existing at the union, so as to bring it, if necessary, under the terms of section 22 of the Manitoba Union Act.

However, from these reasons the petitioners are now precluded. If any of their rights and privileges had been prejudicially affected, this legislation would be *ultra vires*, and it is settled that it is not *ultra vires.*

And the argument against their contention is very strong that, it being determined that it would have been in the power of the Manitoba legislature to establish in 1871, at the outset of the political organization of the province, the system of schools that they adopted in 1890, by the statutes which the petitioners now complain of, it cannot be that by then adopting and regulating a system of separate schools, though not obliged to do so, they for ever bound the future generations of the province to that policy, so that as long at least as there would be even only one Roman catholic left in the province, the legislature should be, for all time to come, deprived of the power to alter it, though the constitution vests them with the jurisdiction over education in the province. To deny to a legislative body the right to repeal its own laws, it may be said, is so to curtail its powers that an express article of its constitution must be shown to support the proposition; it is not one that can be deductively admitted.

If this legislation of 1890, it may be still further argued against the petitioners' contentions, had been adopted in 1871, it would, it must now be conceded, have been constitutional, and that being so, would the catholic minority then, in 1871, have had

a right of appeal to the governor general in council? Certainly, that is partly the same question in a different form. But it demonstrates, put in that shape, that the petitioners have now no right of appeal. The answer to their claim would then have been: that they had no appeal, because none of their rights and privileges have been prejudicially affected. Now, in my opinion, they have no other rights and privileges, in the construction that these words bear in the Manitoba charter, than the rights and privileges they had in 1870. And, if they would have had no appeal then, on a legislation in 1871 similar to that of 1890, they have none now, if none of their rights and privileges have been prejudicially affected.

I would answer the first question in the negative. This conclusion determines my answers to the other questions submitted to the court, and, consequently, as at present advised, I would answer the six of them as follows:—

To no. 1.—Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Victoria (1870), chapter 3, (Canada)? I would answer—No.

To no. 2.—Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to, or either of them? I would answer—No.

To no. 3.—Does the decision of the judicial committee of the privy council in the cases of Barrett *vs.* the City of Winnipeg and Logan *vs.* the City of Winnipeg, dispose of or conclude the application for redress based on the contention that the rights of the Roman catholic minority, which accrued to them after the union under the statutes of the province, have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials? I would answer—Yes.

To no. 4.—Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba? I would answer—No.

To no. 5.—Has his excellency the governor general in council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has his excellency the governor general in council any other jurisdiction in the premises? I would answer—No.

To no. 6.—Did the acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a system of separate or dissentient schools within the meaning of subsection 3 of section 93 of the British North America Act, 1867, if said section 93 be found applicable to Manitoba; and, if so, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the governor general in council?—I would answer—No.

Certified true copy.

G. DUVAL,
Reporter S.C.C.

In the matter of certain Statutes of the province of Manitoba relating to Education.

GWYNNE, J.—The questions submitted in the case stated by the order of his excellency the governor general in council for the opinion of this court, are as follows:—

1. Is the appeal referred to in the memorials and petitions stated in, and made part of, the case and asserted thereby such an appeal as is admissible by subsection 3 of section 93 of the British North America Act of 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Victoria (1870), chapter 3, (Canada)?

2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to or either of them?

3. Does the decision of the judicial committee of the privy council in the cases of Barrett *vs.* the City of Winnipeg and Logan *vs.* the City of Winnipeg, dispose of

or conclude the application for redress based on the contention that the rights of the Roman catholic minority, which accrued to them after the union under the statutes of the province, have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials?

4. Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba?

5. Has his excellency the governor general in council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has his excellency the governor general in council any other jurisdiction in the premises?

6. Did the acts of Manitoba relating to education, passed prior to the session of 1890, confer or continue a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of the Manitoba act, or establish a system of separate or dissentient schools within the meaning of subsection 3 of section 93 of the British North America Act, 1867, if said section be found to be applicable to Manitoba; and, if so, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the governor general in council?

The memorials and petitions referred to in and made part of the case were presented to his excellency the governor general in council in April, 1890, and in September and October, 1892. That of April, 1890, was signed by his grace the archbishop and 4266 other members of the Roman catholic church.

It is alleged: 1. That "prior to the creation of the province of Manitoba there existed in the territory now constituting that province a number of effective schools for children.

"2. That these schools were denominational schools, some of them being regulated and controlled by the Roman catholic church, and others by various protestant denominations.

"3. That the means necessary for the support of the Roman catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the church, contributed by its members.

"4. That during the period referred to, Roman catholics had no interest in or control over the schools of the protestant denominations, and the protestant denominations had no interest in or control over the schools of the Roman catholics. There was no public schools in the sense of state schools. The members of the Roman catholic church supported the school of their own church for the benefit of the Roman catholic children, and were not under obligation to, and did not contribute to the support of any other schools.

"5. That in the matter of education, therefore, during the period referred to, Roman catholics were, as a matter of custom and practice, separate from the rest of the community."

The petition then set forth the 22nd section of the Manitoba Act (33 Vict., ch. 3), and proceeded as follows in paragraph 7 and following paragraphs:

"7. During the first session of the legislative assembly of the province of Manitoba, an act was passed relating to education, the effect of which was to continue to the Roman catholics that separate condition with reference to education which they had previous to the erection of the province.

"8. The effect of the statute so far as Roman catholics were concerned was merely to organize the efforts which Roman catholics had previously voluntarily made for the education of their own children. It provided for the continuance of schools under the sole control and management of Roman catholics, and of the education of their children according to the methods by which alone they believe children should be instructed.

"9. Ever since the said legislation and until the last session of the legislative assembly, no attempt was made to encroach upon the rights of the Roman catholics so confirmed to them as above mentioned, but, during said session, statutes were passed, 53 Vict., chaps. 37 and 38, the effect of which was to deprive the Roman

catholics altogether of their separate condition in regard to education, to merge their schools with those of the protestant denominations, and to require all members of the community, whether Roman catholic or protestant, to contribute through taxation to the support of what are therein called public schools, but which are in reality a continuation of the protestant schools.

"10. There is a provision in the said act for the appointment and election of an advisory board and also for the election in each municipality of school trustees; there is also a provision that the said advisory board may prescribe religious exercises for use in schools and that the said school trustees may, if they think fit, direct such religious exercises to be adopted in the schools in their respective districts. No further or other provision is made with reference to religious exercises and there is none with reference to religious training.

"11. Roman catholics regard such schools as unfit for the purposes of education, and the children of Roman catholic parents cannot and will not attend any such schools. Rather than countenance such schools, Roman catholics will resort to the voluntary system in operation previous to the Manitoba Act, and will at their own private expense establish, support and maintain schools in accordance with their principles and their faith, although by so doing they will have in addition thereto to contribute to the expense of the so called public schools.

"12. Your petitioners submit that the said act of the legislative assembly of Manitoba is subversive of the rights of Roman catholics guaranteed and confirmed to them by the statute erecting the province of Manitoba, and prejudicially affects the rights and privileges with respect to Roman catholic schools which Roman catholics had in the province at the time of its union with the dominion of Canada.

"13. That the Roman catholics are in minority in said province.

"14. The Roman catholics of the province of Manitoba therefore appeal from the said act of the legislative assembly of Manitoba."

The petitioners therefore prayed: "1st. That his excellency the governor general in council may entertain the said appeal and may consider the same and may make such provisions and give such directions for the hearing and consideration of the said appeal as might be thought proper.

"2. That it might be declared that such provincial law does prejudicially affect the rights and privileges with regard to denominational schools which Roman catholics had by law or practice in the province at the union.

"3. That such directions might be given and provisions made for the relief of the Roman catholics of the province as to his excellency in council might seem fit."

A report of the minister of justice, dated the 21st March, 1891, upon the two acts of the legislature of the province of Manitoba, 53 Vict., chap. 37 and 38, has also been made part of the case submitted to us, in which reference is made to the cases of Barrett *vs.* Winnipeg and Logan *vs.* Winnipeg, then pending in appeal to the supreme court of Canada, and also to the said petition of his grace the archbishop of St. Boniface and others in the following terms: "If the appeal should be successful these acts will be annulled by judicial decision. The Roman catholic minority of Manitoba will receive protection and redress. The acts purporting to be repealed will remain in operation and those whose views have been represented by a majority of the legislature cannot but recognize that the matter has been disposed of with due regard to the constitutional rights of the province.

"If the controversy should result in the decision of the court of queen's bench (of Manitoba) being sustained, the time will come for your excellency to consider the petitions which have been presented by and on behalf of the Roman catholics of Manitoba for redress under subsections 2 and 3 of section 22 of the Manitoba Act."

The petitions of September, 1892, were two, the one of T. A. Bernier, representing himself to be acting president of a body called the national congress, and of eleven others, members of the executive committee of the said body; and the other, dated the 22nd September, 1892, was the petition of his grace the archbishop of St. Boniface.

In the former the petitioners set out at large the above petition of April, 1890, and the report of the minister of justice, from which the above extract is taken and concluded as follows:

"That a recent decision of the judicial committee of the privy council in England having sustained the judgment of the court of queen's bench of Manitoba, upholding the validity of the acts aforesaid, your petitioners most respectfully represent that, as intimated in the said report of the minister of justice, the time has now come for your excellency to consider the petitions which have been presented by and on behalf of the Roman catholics of Manitoba for redress under subsections 2 and 3 of section 22 of the Manitoba Act.

"That your petitioners, notwithstanding such decision of the judicial committee of the privy council in England, still believe that their rights and privileges in relation to education have been prejudicially affected by said acts of the provincial legislature.

"Therefore, your petitioners most respectfully and most earnestly pray that it may please your excellency in council to take into consideration the petitions above referred to and to grant the conclusions of said petitions and the relief and protection sought by the same."

The petition of his grace the archbishop of St. Boniface sets forth the matter, as alleged in the petition signed by him and others, in the petition of April, 1890, and certain extracts from the said report of the minister of justice of March, 1891, including that above extracted, and concluded as follows:—

"8. That the judicial committee of her majesty's privy council has sustained the decision of the court of queen's bench.

"9. That your petitioner believes that the time has now come for your excellency to consider the petitions which have been presented by and on behalf of the Roman catholics of Manitoba for redress, under subsections 2 and 3 of section 22 of the Manitoba Act, as it has become necessary that the federal power should be resorted to for the protection of the Roman catholic minority, and the petition prayed that his excellency the governor general in council might entertain the appeal of the Roman catholics of Manitoba, and might consider the same, and might make such provisions and give such directions for the hearing and consideration of the said appeal as might be thought proper, and that such directions might be given and provisions made for the relief of the Roman catholics of the province of Manitoba as to his excellency in council might seem fit."

These petitions are framed upon the contention and assumption that the facts as stated in the petitions as to the rights and privileges of Roman catholics in Manitoba in relation to education at the time of the creation of the province entitled them to procure by appeal to his excellency in council, under section 22 of the Manitoba Act, the amendment and repeal of the provincial acts 53 Victoria, chaps. 37 and 38, notwithstanding that these acts had been declared by the judgment of the judicial committee of the privy council in England to have been and to be acts quite within the jurisdiction of the legislature of Manitoba to enact.

The petition of October, 1892, is, however, framed with a further contention. It is signed by his grace the archbishop of St. Boniface, T. A. Bernier, as president of the body called the national congress, James E. P. Prendergast, as mayor of St. Boniface, J. Allard, O.M.I., V.G., John S. Ewart, and 137 others. This petition sets out, *verbatim*, the matters alleged in the first twelve paragraphs of the above petition of April, 1890, and it then proceeds: (13.) "Your petitioners further submit that the said acts of the legislative assembly of Manitoba are subversive of the rights and privileges of Roman catholics provided for by the various statutes of the said legislative assembly prior to the passing of the said acts and affect the rights and privileges of the Roman catholic minority of the queen's subjects in the said province in relation to education, so provided for as aforesaid, thereby offending both against the British North America Act and the Manitoba Act," and the petition prayed as follows: "Your petitioners therefore pray, 1. That your excellency the governor general in council may entertain the said appeal and may consider the same and may make such provisions and give such direction for the hearing and consideration of the said appeal as may be thought proper.

"2. That it may be declared that the said Acts 53 Vict., chaps. 37 and 38, do prejudicially affect the rights and privileges with regard to denominational schools which Roman catholics had by law or practice in the province at the union.

"3. That it may be declared that the said last mentioned acts do affect the rights and privileges of the Roman catholic minority of the queen's subjects in relation to education.

"4. That it may be declared that, to your excellency the governor general in council, it seems requisite that the provisions of the statutes in force in the province of Manitoba prior to the passing of the said Acts should be re-enacted, in so far at least as may be necessary to secure to the Roman catholics in the said province the right to build, maintain, equip, manage and conduct these schools in the manner provided for by the said statutes, to secure to them their proportionate share of any grant made out of the public funds for the purposes of education and to relieve such members of the Roman catholic church as contribute to such Roman catholic schools from all payment or contribution to the support of any other schools, or that the said Acts of 1890 should be so modified or amended as to effect such purpose.

"5. And that such further or other declaration or order may be made as to your excellency the governor general in council shall under the circumstances seem proper and that such directions may be given, provisions made and all things done in the premises for the purpose of affording relief to the said Roman catholic minority in the said province as to your excellency in council may seem meet.

"And your petitioners will ever pray, etc."

The pretension of the petitioners therefore appears to be that the 22nd section of the Manitoba Act entitles the petitioners, notwithstanding the judgment of the privy council in England, in Barrett *vs.* Winnipeg, and Logan *vs.* Winnipeg, to invoke and to obtain the interference of his excellency the governor general in council to compel, in effect, a repeal by the provincial legislature of the said acts of 53 Victoria and the re-enactment of the statutes in force in the province in relation to education at the time of the passing of the acts 53 Vict., upon the grounds following:—

1. That the acts of 53 Vict. prejudicially affect the rights and privileges with regard to denominational schools which Roman catholics had enjoyed previous to the erection of the province, and

2. That the said acts, 53 Vict., prejudicially affect the rights and privileges of Roman catholics in the province, provided for by various statutes of the provincial legislature enacted prior to the passing of the acts 53 Vict. Under these circumstances, the case which has been submitted to us has been framed in the shape in which it has been for the purpose of presenting to us purely abstract questions of law.

The learned members of the judicial committee of the privy council who advised her majesty upon the appeals in the cases of Barrett *vs.* Winnipeg and Logan *vs.* Winnipeg, adopting the evidence of the archbishop of St. Boniface as to the rights and privileges in relation to denominational schools enjoyed by Roman catholics before the passing of the Manitoba Act in the territory by that act erected into the province of Manitoba, say in their report: "Now, if the state of things which the archbishop describes as existing before the union had been a system established by law, what would have been the rights and privileges of the Roman catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees, or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similar work at the time of the union would have had precisely the same right with respect to their denominational schools. Possibly the right, if it had been defined or recognized by positive enactment, might have had attached to it as a necessary or appropriate incident, the right of exemption from and contribution under any circumstances, to a school of a different denomination. But in their lordships' opinion it would be going much too far to hold that the establishment of a national system of education upon a nonsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of one neces-

sarily implies or involves immunity from taxation for the purpose of the other." They then minutely review the provisions of the provincial statutes enacted prior to the passing of the acts of 1890, and of the acts of 1890 themselves, and proceed as follows: "Notwithstanding the public school acts, 1890, Roman catholics and members of every other religious body in Manitoba are free to establish schools throughout the province; they are free to maintain their schools by school fees or voluntary contributions; they are free to conduct their schools according to their own religious tenets, without molestation or interference; no child is compelled to attend a public school, no special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend."

To this it may be added that Roman catholics are not excluded from the advisory board created by the acts. They are equally eligible as protestants to such board, and, as members thereof, can, equally with protestants, exert their influence upon the board with regard to religious exercises in the public schools. And, in short, Roman catholics and protestants of every denomination are in every respect placed by the acts in precisely the same position. The judgment of the privy council then proceeds as follows:—

"But, then, it is said that it is impossible for Roman catholics or for members of the church of England (if their views are correctly represented by the bishop of Rupert's Land who has given evidence in Logan's case) to send their children to public schools where the education is not superintended and directed by the authorities of their church, and that therefore Roman catholics and members of the church of England who are taxed for public schools and at the same time feel themselves compelled to support their own schools are in a less favourable position than those who can take advantage of the free education provided by the act of 1890; that may be so, but what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect and to the teaching of their church that Roman catholics and members of the church of England find themselves unable to partake of advantages which the law offers to all alike. The judgment than summarily rejects the contention that the public schools created by the acts of 1890 are in reality "protestant schools," and concludes in declaring and adjudging that those acts do not prejudicially affect the rights and privileges enjoyed by Roman catholics in the territory now constituting the province of Manitoba, prior to the passing of the Manitoba Act, taking these rights and privileges to have been as represented by the archbishop of St. Boniface, and even assuming them to have been secured or conferred by positive law, and so that they are not enacted in violation of section 22 of the Manitoba Act, but are within the exclusive jurisdiction of the provincial legislature to enact. Their lordships of the privy council, in Barrett *vs.* Winnipeg, and Logan *vs.* Winnipeg, put a construction upon this section 22 which, independently, is to my mind sufficiently apparent, but which I quote as a judicial enunciation of their lordships' opinion; they say:—"Their lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege with respect to denominational schools which any class of persons practically enjoyed at the time of the union." The language of the section is, I think, sufficiently clear upon that point, and all its subsections are enacted for the purpose of securing the single object, namely, the preservation of existing rights. The section enacts: "22. In and for the province the said legislature may exclusively make laws in relation to education subject and according to the following provisions:—

"1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

"2. An appeal shall lie to the governor general in council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education.

"3. In case any such provincial law as from time to time seems to the governor general in council requisite for the due execution of the provisions of this section is

not made, or in case any decision of the governor general in council on any appeal under this section is not duly executed by the proper provincial authority, in that behalf, then and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the governor general in council under this section."

If any law should be passed in violation of the qualification contained in the first subsection upon the general jurisdiction conferred by the section to make laws in relation to education; that is to say, in case any act should be passed by the provincial legislature prejudicially affecting any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union, such an act would be *ultra vires* of the provincial legislature to enact and would therefore have no force and as it was to preserve those rights and privileges with regard to denominational schools, whatsoever they were which existed at the time of the union, that the 22nd section was enacted, it is obvious, I think, that it is against such an act of the legislature and against any decision of any provincial authority acting in an administrative capacity prejudicially affecting any such right that the appeal is given by the 2nd subsection. And so, likewise, the remedies provided in the 3rd subsection relate to the same rights and privileges and to the better securing the enjoyment of them. The 2nd and 3rd subsections are designed as means to redress any violation of the rights preserved by the section. To subject any act of the legislature to the appeal provided in the 2nd subsection and to remedies provided in the 3rd sub-section it is obvious that such an act must be passed in violation of the condition subject to which any jurisdiction is conferred upon the provincial legislature to make laws in relation to education, and must therefore be *ultra vires* of the provincial legislature; for the language of the section expressly excludes from the provincial legislature all jurisdiction to pass such an act. Jurisdiction, whatever its extent may be, which the provincial legislature has over education being declared to be exclusive, there can be no appeal to any other authority against an act passed by the legislature with such jurisdiction, and any act of the legislature passed in violation of any of the provisions in section 22, subject to which the jurisdiction of the legislature is restricted, is not within that jurisdiction and is therefore *ultra vires*. The appeal, therefore, which is given by the 2nd subsection must be only concurrent with the right of all persons injuriously affected by such an act to raise in the ordinary courts of justice the question of its constitutionality. If any doubt could be entertained upon this point it is concluded in my opinion by their lordships of the privy council in Barrett *vs.* Winnipeg and Logan *vs.* Winnipeg in the following language: "At the commencement of the argument a doubt was suggested as to the competency of the present appeal in consequence of the so called appeal to the governor in council, provided by the act, but their lordships are satisfied that the provisions of subsections 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary 'tribunals of the country.'" If an act of the provincial legislature which is impeached upon the suggestion of its prejudicially affecting such rights and privileges as aforesaid, is not made by the 22nd section of the Manitoba Act *ultra vires* of the provincial legislature, it cannot be open to appeal under subsection 2 of that section. The section does not profess to confer upon the executive of the Dominion or the Dominion parliament any power of interference whatever with any act in relation to education passed by the provincial legislature of Manitoba, which is not open to the objection of prejudicially affecting some right or privilege with respect to denominational schools which some class of persons had by law or practice in the province at the union; all acts of the provincial legislature not open to such objection are declared by the section to be within the exclusive jurisdiction of the provincial legislature; and as the acts of 1890 are declared by their lordships not to be open to such objection, and to have therefore been within the jurisdiction of the provincial legislature to pass, those acts cannot nor can either of them, be open to an appeal under the 2nd subsection of the section. It has been suggested, however, that the rights and privileges, whether conferred or recognized by the acts of the legislature of Manitoba in force prior to

and at the time of the passing of the acts of 1890 and which were thereby repealed were within the protection of the 22nd section and that this was a matter not under consideration in Barrett *vs.* Winnipeg and Logan *vs.* Winnipeg, and that therefore the right of appeal under subsection 2 of the 22nd section against such repeal does exist, notwithstanding the decision of the privy council in Barrett *vs.* Winnipeg and Logan *vs* Winnipeg. This contention appears to have been first raised expressly in the petition presented in October, 1892, although it is impliedly comprehended in the paragraph of the petition of April, 1890, which is repeated, *verbatim*, in that of October, 1892, wherein the act of the provincial legislature of 1871 is relied upon as having had "the effect to continue to the Roman catholics that separate condition with reference to education which they had enjoyed previous to the erection of the province, made, in so far as Roman catholics were concerned, merely to organize the efforts which the Roman catholics had previously voluntarily made for the continuance of schools under the sole control and management of Roman catholics, and of the education of their children according to the methods by which alone they believe children should be instructed." But this statute of 1871 and all the statutes passed by the legislature of Manitoba in relation to education prior to 1890, were specially brought under the notice of their lordships of the privy council, and were fully considered by them in their judgment, as already pointed out, and if the repeal by the act of 1890 of the acts of the provincial legislature, then in force in relation to education, constituted a violation of the condition contained in section 22, subject to which alone the jurisdiction of the provincial legislature to make laws in relation to education was restricted, it is inconceivable to my mind that their lordships, having all these statutes before them, could have pronounced the acts of 1890 to be within the jurisdiction of the provincial legislature to pass. But, however this may be, there is nothing, in my opinion, in the Manitoba Act which imposed any obligation upon the legislature of Manitoba to pass the acts which are repealed by the acts of 1890, or which placed those acts when passed in any different position from that of all acts of a legislature which constitute the will of the legislature for the time being and only until repealed. And nothing which warrants the contention that the repeal of those acts by the acts of 1890 constituted a violation of the condition in the 22nd section, subject to which the jurisdiction of the legislature was restricted; and nothing, therefore, which gives any appeal against such repeal. Whether or not the third subsection of section 93 of the British North America Act of 1867, assuming that section to apply to the province of Manitoba, would have the effect of restraining the power of the provincial legislature in such a manner as to deprive them of jurisdiction to repeal the said acts, it is unnecessary to inquire, for that section does not, in my opinion, apply to the province of Manitoba, special provision upon the subject of education being made by the 22nd section of the Manitoba Act. For the above reasons, therefore, the questions submitted in the case must, in my opinion, be answered as follows:—The 1st, 2nd, 4th and 5th in the negative, the 3rd in the affirmative, and the 6th, which is a complex question, as follows: The acts of 1890 do not, nor does either of them, affect any right or privilege of a minority in relation to education within the meaning of subsection 2 of section 22 of the Manitoba Act in such manner that an appeal will lie thereunder to the governor general in council. The residue of the question is answered by the answer to question no. 4.

Certified true copy.

G. DUVAL,
Reporter S.C.C.

In the matter of certain Statutes of the province of Manitoba relating to Education.

KING, J.—It may be convenient, first, to regard the constitutional provisions respecting education as they affect the original provinces of the confederation. By section 93 of the British North America Act, it is provided that in and for each province the legislature may exclusively make laws in relation to education, subject and according to the provisions of four subsections.

The first subsection provided that nothing in any such law should prejudicially affect any right or privilege with respect to denominational schools which any class of persons had, by law, in the province at the union.

The second subsection extended to the dissentient schools of the queen's protestant and Roman catholic subjects in Quebec all the powers, privileges and duties which were at the union conferred and imposed by law in Upper Canada (Ontario) on the separate schools and school trustees of the queen's Roman catholic subjects there.

The third subsection gave to the governor general in council the right on appeal to decide whether or not an act or decision of any provincial authority affects any right or privilege of the protestant or Roman catholic minority in relation to education enjoyed by them under a system of separate or dissentient schools in the province, whether such system of separate or dissentient schools shall have existed, by law, at the union or shall have been thereafter established by the legislature of the province.

The fourth subsection provided that if, upon the appeal, the governor general in council shall decide that the educational right or privilege of the protestant or Roman catholic minority has been so affected, then, if the provincial legislature shall not pass such laws as from time to time seem to the governor general in council requisite for the due execution of the provisions of the section, or if the proper provincial authority shall not duly execute the decision of the governor general in council on the appeal, then in every such case, but only so far as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the governor general in council under the section. In other words: If the requisite remedy, either by act of the legislature or act or decision of the proper provincial authority in that behalf is not applied, then concurrent legislative authority, to the requisite extent, is given to the Dominion parliament, and to this extent the legislative authority of the provincial legislature ceases to be exclusive.

The terms "separate" and "dissentient" schools, used in the above subsections, were derived from the school systems of Upper and Lower Canada. At the union, the two larger confederating provinces, Upper Canada (Ontario) and Lower Canada (Quebec), had each a system of separate or dissentient schools, the Canadian method of dealing with the question of religion (as between protestants and Roman catholics) in the public school system.

In Upper Canada the Roman catholics were in the minority and in Lower Canada the protestants were in a still smaller minority. In Upper Canada there was a non-denominational public system, with a right in the Roman catholics to a separate denominational system. In Lower Canada the general public system was markedly Roman catholic with a right to the protestant minority to schools of their own. In Upper Canada the minority schools were called "separate" schools; in Lower Canada "dissentient" schools. It was because the powers and privileges of the Upper Canada minority in relation to their schools were greater than those of the Lower Canada minority, that by the terms of union these were agreed to be assimilated by adopting for Quebec the more enlarged liberties of the Upper Canada law; and this was given effect to by subsection 2 of section 93, already cited.

In the case of the two other of the original confederating provinces, Nova Scotia and New Brunswick, there was not, in either, a system of separate or dissentient schools.

The bounds of the Dominion have been since enlarged. In 1870, by the admission of the North-west Territory and Rupert's Land; in 1871, by the admission of British Columbia, and in 1873, by the admission of Prince Edward Island. In the case of British Columbia and Prince Edward Island (these being established and independent provinces) the terms of union were agreed upon by the governments and legislatures of Canada and the provinces respectively. In each case the above recited provisions of the British North America Act respecting education were adopted and made applicable without change. In neither of these newly added provinces was there a system of separate or dissentient schools.

With regard to the North-west Territories and Rupert's Land, there was no established government and legislature representing the people, and after the acquisition of the North-west Territories and Rupert's Land the parliament of Canada, after listening to representations of representative bodies of the people, passed an act for the creation and establishment of the new province of Manitoba out of and over a portion of the newly acquired territory, and it is with regard to this Act, (33 Vict. c. 3) that the present questions arise.

By section 2 it is declared that "The provisions of the British North America Act shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to or only to affect one or more, but not the whole, of the provinces now composing the Dominion, and except so far as the same may be varied by this act, be applicable to the province of Manitoba in the same way and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces originally united by the said act."

The act then deals specially with a number of matters, as for instance the constitution of the executive and legislative authority, the use of both the English and French languages in legislative and judicial proceedings, financial arrangements and territorial revenues, etc., and by section 22 makes the following provision respecting education:—

"22. In and for the province the said legislature may exclusively make laws in relation to educational subjects, and according to the following provisions:

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice at the union.

"(2.) An appeal shall lie to the governor general in council from any act or decision of the legislature of the province, or of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education.

"(3.) In case any such provincial law as from time to time seems to the governor general in council requisite for the due execution of the provisions of this section is not made, or in case any decision of the governor general in council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the governor general in council under this section."

Subsection 1 of section 22 of the Manitoba Act differs from subsection 1 of section 93 of the British North America Act of 1867, in the addition of the words "or practice" after the words "which any class of persons have by law."

In Winnipeg *vs.* Barrett, the judicial committee of the privy council held that the Manitoba Education Act of 1890 did not prejudicially affect any right or privilege or any benefit or advantage in the nature of a right or privilege with respect to denominational schools which the Roman catholics practically enjoyed at the time of the establishment of the province.

The second subsection of section 93 (British North America Act) has, of course, no counterpart in any of the subsections of section 22 (Manitoba Act) because subsection 2, section 93 (British North America Act) is a clause specially applicable to and affecting only the province of Quebec.

The third subsection of section 93 (British North America Act) and the second subsection of section 22 (Manitoba Act) deal with the like subject, viz, the right of the religious minority to appeal to the governor general in council in case of their educational rights or privileges being affected; but here again there are differences.

One difference is that whereas by the clause in the British North America Act the appeal lies from an "act or decision of any provincial authority" affecting any right or privilege of the protestant or Roman catholic minority in relation to education; in the Manitoba Act the appeal lies from "any act or decision of the legislature of the province" as well as from that of any provincial authority. This

was either an extension of the right of appeal or the getting rid of an ambiguity according as the words "any provincial authority" as used in the British North America Act did not or did extend to cover "acts of the provincial legislature."

The addition in the first subsection of the Manitoba Act of the words "or practice" and the addition in subsection 2 of the words "of the legislature of the province," would (so far as the context of these words is concerned) seem to show an intention on the part of parliament to extend the constitutional protection accorded to minorities by the British North America Act, or, at all events, to make no abatement therein.

Then there is another difference between the language of the 3rd subsection of the British North America Act and that of the 2nd subsection of the Manitoba Act. The former begins as follows: "Where in any province a system of separate and dissentient schools exists by law at the union or is thereafter established by the legislature of the province, an appeal shall lie," etc., while in the Manitoba Act the introductory part is omitted and the clause begins with the words "an appeal shall lie," etc., the two clauses being thereafter identical with the exception that in the Manitoba Act (as already mentioned) the appeal in terms extends to complaints against the effect of acts of the legislature as well as of acts or decisions of any provincial authority.

After this reference to points of distinction, I cite subsection 2 of the Manitoba Act again in full for sake of clearness.

"An appeal shall lie to the governor general in council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education."

On the one side it is contended that in order to give the appeal the rights or privileges of the religious minority need to have been acquired and to have existed prior to and at the time of the passage of the act. On the other side it is contended that it is sufficient if the rights and privileges exist at the time of their alleged violation irrespective of the time when they were acquired.

In the argument before the judicial committee of Winnipeg *vs.* Barrett, a shorthand report of which was submitted to parliament last session (Sessional Paper, No. 33*a*), Sir Horace Davey, council for the city of Winnipeg, argued that subsection 2 does not relate to anything but what is *ultra vires* under subsection 1. He says: (p. 43) "I cannot for myself frame the proposition which would lead to the inference that subsection 2 was intended to deal with cases which were *intra vires*, and I beg leave to observe that it would be contrary to the whole scope and spirit of this legislation to provide for parliament intervening, not where the provincial parliament has acted beyond its powers—that I could conceive—that I could follow—there would be nothing inconsistent with the general course of legislation in that—but to allow the Dominion parliament to intervene, not to correct mistakes where the provincial legislature had gone wrong and exceeded their powers."——In an interuption at this point by their lordships, Lord MacNaughton asks: "Supposing some rights were created after the union, and then legislation had taken those rights away?" This question is not directly answered, but afterwards (p. 44) Sir Horace thus continues: It all comes back to the same point, that the protestant and catholic minority have a right to come with a grievance to the governor general. What is that grievance? Why, that they are deprived of some right or privilege which they ought to have and are entitled to enjoy. If they are not entitled by law to enjoy it they are not deprived of anything, and it would be an extraordinary system of legislation, having regard to the nature of this act, to say that the Dominion parliament has in certain cases to sit by way of a court of appeal from the provincial parliament, not to correct mistakes where the provincial parliament has erroneously legislated on matters not within its jurisdiction, but on matters of policy. * * * If that be the effect to be given to these subsections, I venture to submit to your lordships that it will have the rather startling consequences, and it will for the first time make the legislature of the Dominion parliament a court of appeal or give them an appeal from the exercise of the discretion of the provincial parliament, or, in other words,

it will place the provincial parliament in the position that it will be liable to have its decisions overruled by the Dominion parliament, and therefore in a position of inferiority."

I have quoted at great length, because of the strong presentation by eminent counsel of that view, and to show that the attention of their lordships was powerfully drawn to the provisions of subsection 2. The full report shows that all the subsections of the two sections of the two acts were exhaustively discussed.

In the judgment, their lordships say that:—"Subsections 1, 2 and 3 of section 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sections of section 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in subsection 1, the words 'by law' are followed by the words 'or practice' which do not occur in the corresponding passage in the British North America Act, 1867."

There would be a marked and very considerable difference between the corresponding clauses if in the one case rights and privileges of the religious minority were recognized as subjects of protection whenever acquired, while in the other case they were not recognized as subjects of protection unless they existed at the time of the passing of the constitutional act.

Not wanting to put undue stress upon this, let us look at the clauses for ourselves. In subsection 1 (Manitoba Act) there is an express limitation as to time: the rights and privileges in denominational schools that are saved are such as existed (by law or practice) at the union. But in subsection 2 nothing is said about time at all; and the natural conclusion upon a reading of the two clauses together is that with regard to the rights and privileges referred to in the latter clause, the time of their origin is immaterial. Such also is the ordinary and natural meaning of subsection 2 regarded by itself. Read by itself, it extends to cover rights and privileges existent at the time of the act or thing complained of. The existence of the right, and not the time of its creation, is the operative and material fact. And this agrees with the corresponding provisions of the British North America Act, where subsection 1 refers to rights, etc., acquired before or at union; while subsection 3 in terms covers rights, etc., acquired at any time. In any other view there was clearly no necessity to add the words "or any act of the legislature" in the remedial provision of the Manitoba Act, for such act would be wholly null and void under subsection 1.

There is, however, an undeniable objection to treating as an appealable thing the repeal by a legislature of an act passed by itself. Ordinarily all rights and privileges given by act of parliament are to be enjoyed *sub modo* and are subject to the implied right of the same legislature to repeal or alter if it chooses to do so. But the fundamental law may make it otherwise. An illustration of this is afforded by the constitution of the United States, which prohibits the states (but not congress) from passing any law impairing the obligation of contract; and this has been held to prevent state legislatures from repealing or materially altering their own acts conferring private rights when such rights have been accepted. It does not extend to acts relating to government as, for instance, to public officers, municipal incorporations, etc., but it extends to private and other corporations, educational or otherwise, and also to acts exempting incorporated bodies, by special act, from rates or taxes. These are irrepealable, and the constitutional provision has been found onerous.

It is certainly anomalous under our system and theory of parliamentary powers that a legislature may not repeal or alter in any way an act passed by itself.

Still, weighty as this consideration is, I can give no other reasonable interpretation to the act in question than that, under the constitution of Manitoba, as under the constitution of the Dominion, the exercise by the provincial legislature of its undoubted powers in a way so as to give rights and privileges by law to the minority in respect of education lets in the Dominion parliament to concurrent legislative authority for the purpose of preserving and continuing such rights and privileges, if it sees fit to do so. By the British North America Act it was not clear whether the words "act or decision of any provincial authority" covered the case of an act of the provincial legislature, or was confined to administrative acts, but in the Manitoba Act the words explicitly extend to an act of that legislature.

Any ambiguity in subsection 2 of the Manitoba Act is, I conceive, to be resolved in the light of the corresponding provisions of the British North America Act. As the provisions of the British North America Act are to be applicable, unless varied, I think it reasonable that ambiguous provisions in the special act should be construed in conformity with the general act. Passing, however, from it as a matter of construction, it does not seem reasonable that parliament, in forming, in 1870, a constitution for Manitoba, intended to disregard entirely constitutional limitations such as were three years before established as binding upon the original members of the confederation. On the contrary, by the addition of the words "or by practice" in 1st subsection, and of the words "or any act of the legislature" in 2nd subsection, and by the provision of section 23, providing for the use of the French and English languages in the courts and legislature, there is manifested a greater tenderness for racial and denominational differences. Further, unless subsection 2 has the meaning suggested, the entire series of limitations imposed by subsections 1, 2 and 3 are entirely inoperative, for the judicial committee has in effect declared that no right or privilege in respect of denominational schools existed prior to the union, either by law or practice, and therefore there was nothing on which subsection 1 could practically operate, and as there was clearly no system of separate or dissentient schools established in Manitoba by law prior to the union, the provision of subsections 2 and 3 are inoperative if the rights and privileges in relation to education are to be limited to rights and privileges before the union.

I also think that where there appears an ambiguity we might well resort to the facts before the government and parliament when they were engaged in settling a constitution for Manitoba.

There is no doubt that this construction limits the powers of the legislature and restrains the exercise of its discretion, but the same thing may be said of the effect of an appeal against "any act or decision of any provincial authority" in Nova Scotia or New Brunswick, in case either of such provinces were to adopt a system of separate schools. The legislature might not choose to pass the remedial legislation necessary to execute the decision of the governor general in council, and the Dominion parliament could then exercise its concurrent power of legislation in effect overriding the legislative determination of the provincial legislature. The provision may be weak, one-sided, as giving finality to a chance legislative vote in favour of separate schools, inconsistent with a proper autonomy, and without elements of permanence, but, if it is in the constitutional system, it must receive recognition in a court of law.

Assuming, then, that clause 2 covers rights and privileges whensoever acquired, the next question is as to the meaning of the words "rights and privileges of the protestant or Roman catholic minority in relation to education?" Here, again, I think we are to go to clause 3 of section 93 British North America Act. I think that the reference is to minority rights under a system of separate schools, and that it is essential that the complaining minority should have had rights or privileges under a system of separate or dissentient schools existing by law at the union or thereafter established by the legislature of the province. The generality of the words under clause 2 of the Manitoba Act is to be explained by clause 3, section 93, British North America Act, and to have the same meaning as the corresponding words in this act.

The two remaining questions then, are: Was a system of separate or dissentient schools established in Manitoba prior to the passage of the Manitoba education act of 1890? And, have any rights or privileges of the Roman catholic minority in relation thereto been prejudicially affected?

One of the learned judges of the queen's bench of Manitoba thus succinctly summarizes the school legislation of Manitoba in force at the time of the passing of the act of 1890.

"Under the school acts in force in the province previous to the passing of the Public School Act of 1890, there were two distinct sets of public or common schools, the one set protestant and the other Roman catholic. The board of education which had the general management of the public schools was divided into two sections,

one composed of the protestant members and one of the Roman catholic members, and each section had its own superintendent. The school districts were designated protestant or Roman catholic, as the case might be. The protestant schools were under the immediate control of trustees elected by the protestant ratepayers of the district and the catholic schools in the same way were under the control of trustees elected by the Roman catholic ratepayers; and it was provided that the ratepayers of a district should pay the assessments that were required to supplement the legislative grant to the schools of their own denomination and that in no case should protestant ratepayers be obliged to pay for a Roman catholic school, or a catholic ratepayer for a protestant school."

I would only add that the assessments were to be ordered by the ratepayers (catholics or protestants, as the case might be) of the school district, and that the trustees were empowered in many cases to collect the rates themselves instead of making use of the public collectors. The trustees were empowered to employ teachers exclusively who should hold certificates from the section of the board of education of their own faith. By the act of 1871, the board of education was composed equally of protestants and Roman catholics. But by the act of 1881, the proportion was twelve protestants to nine Roman catholics.

Now, the system of education established by the act of 1881 was not in terms and *eo nomine* a system of separate or dissentient schools, and if the constitutional provision requires that they should be such in order to come within the act, then the minority did not have the requisite rights and privileges in respect of education. As to this, I have had doubts arising from the opinion that, where rights and privileges have no other foundation than the legislative authority whose subsequent act in effecting them is impeached, the restraint upon the general grant of legislative authority should be applied only where the case is brought clearly within the limitation. At the same time, we are to give fair and reasonable construction to a remedial provision of the constitution and are to regard the substance of the thing. Now, the Roman catholics were in the minority in 1881, and are still, and a system of schools was established, by law, under which they had the right to their own schools—catholic in name and fact—under the control of trustees elected by themselves, taught by teachers of their own faith, and supported (in part) by an assessment ordered by themselves upon the persons and property of Roman catholics, and imposed, levied and collected as a portion of the public rates, the persons and property liable to such rate being at the same time exempt from contribution to the schools of the majority, *i.e.*, the protestant schools. This, although not such in name, seems to me to have been essentially a system of separate or dissentient schools of the same general type as the separate school system of Ontario, and giving, therefore, to the minority rights and privileges, in relation to education, in the sense of subsection 2, section 22 (Manitoba Act) and subsection 3, section 93 (British North America Act).

It is true that the schools of the majority were protestant schools, and that the majority had the same kind of right as the minority, but I do not think that this renders the minority schools any the less essentially separate schools of the Roman catholics. In Quebec the majority schools are distinctly denominational.

Then, was the right and privilege of the Roman catholic minority in this system of separate schools prejudicially affected by the act of 1890; and, if so, to what extent?

In the judgment of the judicial committee in the city of Winnipeg *vs.* Barrett, speaking of the right there claimed on behalf of the Roman catholics that the act of 1890 had prejudicially affected the rights and privileges which they had by practice at the time of the union, their lordships say:

"Now, if the state of things which the archbishop describes as existing before the union had been established by law, what would have been the rights and privileges of the Roman catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was

engaged in a similar work at the time of the union would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognized by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of one necessarily implies or involves immunity from taxation for the purpose of the other."

The rights and privileges of the denominational minority under the act of 1881 and amending acts, were different from the assumed rights in denominational schools which the same class had by practice at the time of the union. It could not be said to be merely "the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions and to conduct them in accordance with their own religious tenents"; it was a right, as Roman catholics, by law to establish schools and to maintain them through the exercise by them of the state power of taxation, by the imposition, levying and collecting of rates upon the persons and property of all Roman catholics, such persons and property being at the same time exempted from liability to be rated for the support of the public schools of the majority, then denominated and being protestant schools. By the act of 1890 the protestant schools are abolished equally with the Roman catholic schools, and a system of public schools set up which is neither protestant nor Roman catholic, but unsectarian. The question then is whether the language of their lordships is applicable to this state of things, and whether or not it can be said (changing their lordships' language to suit the facts) that the establishment of the national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain by the aid of public taxation upon the denominational minority a system of denominational schools that the two cannot co-exist; or that the existence of the system of denominational minority schools (supposing it still in existence) necessarily implies or involves immunity from taxation for the purpose of the other. It rather seems to me that no reasonable system of legislation could consistently seek to embrace these two things, viz.: 1st, the support of a system of separate denominational schools for the minority, maintainable through compulsory rating of the persons and property of the minority; and, 2nd, the support of a general system of unsectarian schools, through the compulsory rating of all persons and property, both of the majority and minority. The effect of such a scheme would be to impose a double rate upon a part of the community for educational purposes. The logical result of this view would be that by the establishment of a general non-sectarian system (as well as by the abrogation of the separate school system) the rights and privileges as previously given by law to the denominational minority in respect of education were necessarily affected. Of course the minority could attain equality by giving up their schools, but the present inquiry at this point is whether a right acquired by law to maintain a system of separate schools has been affected by an act which takes away the legal organization and status of such schools, and their means of maintenance by the repeal of the law giving these things, and which subjects the persons and property of the denominational minority to an educational rate for general nonsectarian schools, instead of leaving them subjected to an educational rate for the support of the separate and denominational schools. It is true that by the act of 1881 and amending acts, the exemption was an exemption from contribution to the protestant schools, and the schools under the act of 1890 are not protestant schools; but the substantial thing involved in the exemption under the acts of 1881 and amending acts was, that the ratepayer to the support of the catholic schools should not have to pay rates for support of the schools established by the rest of the community, but should have their educational rates appropriated solely to the support of their own schools. This was an educational right or privilege accorded to the denominational minority, or in other words, a right or privilege accorded to them in relation to education under a system of separate schools established by law,

which the legislature, if possessing absolute or exclusive authority to legislate on the subject of education, without limitation or restraint, might very well withdraw, abrogate or materially alter; but which, under the constitutional limitations of the Manitoba Act can be done only subject to the rights of the minority, to seek the intervention of the Dominion parliament, through the exercise of the concurrent legislative authority that thereupon become vested in such parliament upon resort being first had to the tribunal of the governor general in council. Although there are points of difference between this case and what would have been the case if the prior legislation of Manitoba had established a system of separate schools, following precisely the Ontario system, I cannot regard the difference as other than nominal, and I treat this case as though the act of 1881 and amending acts distinctly established a system of separate schools giving for the general public a system of undenominational public schools, and to the catholic minority the right to a system of separate schools. In such case, I do not see how the passing of such an act as the act of 1890 could fail to be said (by abolishing the separate schools) to affect the rights and privileges of the minority in respect of education. With some change of phraseology, and some change of method, I think that what has been done in the case before us is essentially the same. If the clauses of the Manitoba Act are to have any meaning at all they must apply to save rights and privileges which have no other foundation originally than a statute of the Manitoba legislature. The constitutional provision protects the separate educational status given by an act of the legislature to the denominational minority. The view that the effect of this is to restrain the proper exercise by the legislature of its power to alter its own legislation is met by the opposite view that there is no improper restraint if it is a constitutional provision, and that in establishing a system of separate schools, the legislature may well have borne in mind the possibly irrepealable character of its legislation in thereby creating rights and privileges in relation to education. I, therefore, answer the questions of the case as follows:

1. Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Victoria (1870), chapter 3, (Canada)? Yes.

2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to, or either of them? Yes.

3. Does the decision of the judicial committee of the privy council in the cases of Barrett *vs.* the City of Winnipeg, and Logan *vs.* the City of Winnipeg, dispose of or conclude the application for redress based on the contention that the rights of the Roman catholic minority which accrued to them after the union under the statutes of the province have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials? No.

4. Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba? Yes, to the extent as explained by the above reasons for my opinion.

5. Has his excellency the governor general in council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has his excellency the governor general in council any other jurisdiction in the premises? Yes.

6. Did the acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a system of separate or dissentient schools within the meaning of subsection 3 of section 93 of the British North America Act, 1867, if said section 93 be found applicable to Manitoba; and, if so, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the governor general in council? Yes.

Certified true copy.

G. DUVAL,
Reporter S. C. C.